Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

BETTINA J. SCHUETZ
AND ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

BANC ONE MORTGAGE CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court must defer to an agency policy statement, the effect of which is to eliminate the availability of class actions to enforce a private right of action established in a statute that contemplates class actions, particularly when the agency's statement was issued without notice-and-comment rulemaking and lacks the force of law.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

Bettina J. Schuetz, together with all others similarly situated, was a plaintiff and the appellant below.

Banc One Mortgage Corporation was a defendant and the appellee below.

Caroline Richter was a plaintiff below, but did not participate in proceedings in the court of appeals.

Home Mortgage Financing Corporation, a/k/a Home Mortgage Financial Corporation, was a defendant below, but did not participate in proceedings in the court of appeals.

Portfolio Mortgage Company, Inc. was a defendant below, but did not participate in proceedings in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 292 F.3d 1004. The opinions and orders of the district court (Pet. App. 23a-55a, 56a-74a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 2002. On August 8, 2002, a petition for rehearing was denied. Pet. App. 75a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES, REGULATIONS, AND RULES INVOLVED

Pertinent sections of the Real Estate Settlement Procedures Act of 1974 ("RESPA"), 12 U.S.C. §§ 2601 *et seq.*, the regulations implementing RESPA, 24 C.F.R.

Pt. 3500, and Federal Rule of Civil Procedure 23 are reproduced at Pet. App. 76a-120a.

INTRODUCTION

Pursuant to standardized contractual arrangements, respondent Banc One Mortgage Corporation ("Banc One") pays fees to mortgage brokers that direct loans with above-market interest rates to Banc One. These fees — which Banc One has paid in tens of thousands of residential real estate transactions — are not for any identifiable services the broker performed for the bank or the borrower, but instead are based solely on the interest rate and the value of the loan referred by the broker.

Section 8(a) of the Real Estate Settlement Procedures Act of 1974 ("RESPA"), 12 U.S.C. § 2607(a), expressly prohibits such referral fees and other types of kickbacks. Congress provided for enforcement of § 8(a) through criminal penalties, injunctive actions brought by federal or state authorities, and an express private right of action with treble damages. *See id.* §§ 2607(d)(1)-(2), (4)-(5), 2614. Nonetheless, vindicating the rights of individual homeowners is difficult, because the injury suffered is generally small — petitioner's injury, for example, is only $516. As this Court has recognized, such widespread, small injuries to consumers are ideally suited to resolution through a class action. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

A divided Ninth Circuit panel, however, concluded that a class could not be certified here, because assessing the legality of Banc One's payments to its affiliated brokers — known as "yield spread premiums" — requires a loan-by-loan determination of whether the overall amount received by the broker in a given transaction is "reasonable" in light of the services performed by the broker. In reaching that conclusion, the panel

majority granted *Chevron*[1] deference to a 2001 policy statement issued by the Department of Housing and Urban Development ("HUD") without notice and comment. This policy statement purports to require courts to examine individualized evidence when consumers seek to prove that a lender's payment of yield spread premiums violates § 8(a), such that class certification is not possible because individual issues necessarily predominate. Yet Congress has expressly delegated to the courts, not to HUD, the authority to adjudicate private rights of action under § 8(a).

Accordingly, the panel majority's decision to defer here conflicts with this Court's holding in *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990), and the decisions of five other courts of appeals that deny agencies the power to issue interpretive rulings that interfere with procedural rights in litigation. The Ninth Circuit decision to defer blindly to HUD under *Chevron* — without engaging in any analysis of the facts or the statute on its own — is particularly egregious because HUD's policy statement lacks the force of law and is contrary to HUD's own efforts to enforce § 8(a).

STATEMENT

1. In 1972, a report by HUD and the Veterans Administration uncovered widespread evidence of abusive practices, kickbacks, and unearned fees in residential real estate transactions. *See* Department of Housing and Urban Development and Veterans Administration, *Report on Mortgage Settlement Costs* at 3 (Jan. 1972). In 1974, Congress enacted RESPA to redress those problems.

Section 8(a) provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real

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[1] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a). As the House Report explained, the Act was intended to "prohibit[] or regulat[e] abusive practices, such as kickbacks, unearned fees, and unreasonable accounts." H.R. Rep. No. 93-1177, at 4 (1974); *see also* S. Rep. No. 93-866 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546, 6551 (§ 8(a) "is intended to prohibit all kickback or referral fee arrangements"). Violations of § 8(a) are subject to both criminal sanctions and civil penalties. *See* 12 U.S.C. § 2607(d).

The reforms ushered in by RESPA became even more critical in light of subsequent trends in the real estate finance industry. Historically, homebuyers obtained loans directly from a local lender, such as a bank or savings and loan. *See Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers*, 64 Fed. Reg. 10080, 10080 (1999) ("1999 Policy Statement"). Beginning in the 1980s, independent mortgage "brokers" began to offer loans, funded by various lenders, directly to homebuyers. *See id.* Today, approximately half of all mortgage loans in the United States are originated by mortgage brokers. These brokers also offer certain services to homebuyers, such as assisting the homebuyer in completing the loan application form, arranging for property appraisals and credit reports to be completed, and choosing the lending institution that finances the homebuyer's mortgage. A homebuyer may pay the broker directly for those services or add those fees to the principal balance of the loan, to be subtracted and paid to the broker at closing. A broker may have a relationship with as many as 20 different lenders and therefore has wide discretion to determine which lender will fund the homebuyer's loan. *See id.* at 10080-81.

The interest rates at which lenders make loans available depend on a number of factors, including market conditions, the size of the loan, and the type of financ-

ing. Each day, if not more frequently, Banc One sends to its affiliated brokers a "rate sheet," which lists a series of interest rates available for different loan types and informs brokers of the incentives and bonuses that the lender offers to pay to the broker — which include, among others, a yield spread premium. A yield spread premium is calculated based on the value of the loan and the amount by which the borrower's interest rate exceeds the "par," or market, rate for that loan.[2]

These rate sheets expressly state that they should not be made available to consumers. *See* Pet. App. 121a ("NO PUBLIC DISTRIBUTION"). And neither Banc One nor Schuetz's broker has a policy of informing borrowers of the par rate for a given loan product. *See* Schuetz C.A. Br. 19 (citing testimony). Because homebuyers have imperfect information about interest rates, brokers have an incentive to offer an interest rate above market to receive the largest possible yield spread premium from the lender.

In August 1997, Schuetz's broker arranged for her to obtain a $68,800 mortgage loan from Banc One at a 7.5% interest rate. Schuetz paid her broker $1,661: $688 for originating the loan, $688 for a loan discount (*i.e.*, "points"), and $285 for processing. *See* HUD-1 Form (lines 801-808), Pet. App. 125a.[3] Unbeknownst to

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[2] A Banc One rate sheet from January 5, 1998, is reproduced at Pet. App. 121a-123a. As shown on that sheet, on that date the par rate (indicated by the figure "100.000") for a 30-year jumbo fixed loan (Program 45B) with a 45-day lock in was 7.25%. *See id.* at 122a, 123a. If a broker brought Banc One that same loan with a 7.5% interest rate, the broker would receive a yield spread premium from Banc One equal to 0.75% of the value of the loan (indicated by the figure "100.750"). *See id.*

[3] By statute, the HUD-1 form must "conspicuously and clearly itemize all charges imposed upon the borrower." 12 U.S.C. § 2603(a); *see also* 24 C.F.R. Pt. 3500 App. A (HUD-1 form is to contain "statement of actual charges and adjustments"). According to Schuetz's HUD-1 form, the $1,661 she paid to her broker covered all "actual charges" for services rendered by the broker. *See* HUD-1 Form (lines

Schuetz, and despite having paid one "discount point" to lower her interest rate, the interest rate for her loan was still above the par rate Banc One offered for the loan she obtained. In exchange for this above-par loan, Banc One paid the broker a yield spread premium of 0.75% of the total amount of the loan, or $516. *See id.* (line 814), Pet. App. 125a. There is no indication on Schuetz's HUD-1 form that this payment was used to offset any amounts charged by the broker for services provided to Schuetz. *See, e.g., id.* (lines 200-209, "Amounts Paid . . . In Behalf Of Borrower"), Pet. App. 124a.[4]

2. On February 23, 1998, petitioner Bettina Schuetz filed a complaint in the district court for the District of Arizona on behalf of a nationwide class of persons, alleging, *inter alia*, that respondent Banc One violated RESPA § 8(a) by paying yield spread premiums to mortgage brokers in connection with their home loans. Petitioner argued that class certification was appropriate because, *inter alia*, the claims involved alleged violations of a federal statute based on common issues of law and fact related to respondent's established business practices, as evidenced through standard contracts between Banc One and mortgage brokers, other corporate documents, and the testimony of respondent's managers and agents.

On March 19, 1999, the district court denied petitioner's request for class certification. *See* Pet. App. 56a-74a. The court's analysis focused on whether "questions of law or fact common to the members of the class

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801-808), Pet. App. 125a. There is no indication on the form — as required by federal law — that the broker's fee for the services performed on her behalf was actually $2,177, of which Banc One paid $516.

[4] We use Schuetz's loan for illustrative purposes, but the facts in every potential class member's case — with respect to both the calculation of the yield spread premium and the information on the HUD-1 form — are similar.

predominate." Fed. R. Civ. P. 23(b)(3); *see* Pet. App. 65a-66a. First, citing *Culpepper v. Inland Mortgage Corp.*, 132 F.3d 692 (11th Cir. 1998), the court found that Banc One was "foreclosed from arguing either that the yield spread premiums [it paid] do not constitute referral fees or that the yield spread premiums qualify under the exception for compensation for goods actually furnished [in RESPA § 8(c)(2)]." Pet. App. 67a. Nonetheless, the court found that common issues did not predominate, because Banc One could offer evidence that a specific borrower and broker did not intend for the borrower's direct payments to compensate the broker fully. *See id.* at 70a-73a.[5]

On September 20, 2000, the district court granted Banc One's motion for summary judgment. *See* Pet. App. 23a-55a. In reviewing Banc One's practice of paying yield spread premiums to brokers, the district court found that Banc One "has no mechanism in place to ensure that brokers present borrowers with a variety of compensation arrangements." *Id.* at 29a. Indeed, respondent's corporate designee testified that Banc One "does not have a policy" of ensuring that brokers inform borrowers of the par rate. Schuetz C.A. Br. 19 (quoting testimony). As a result, the district court found that Banc One's rate sheets enable a broker "effectively [to] command his or her fee," at "a level that Banc One does not review." Pet. App. 29a, 30a. Banc One did not provide any evidence suggesting that Schuetz and her broker intended for Banc One to pay a portion of the fee that Schuetz owed her broker.

The district court, however, found that the legality of the yield spread premium Banc One paid to the broker turned on whether the total amount the broker received was reasonable, regardless of Schuetz's and the broker's

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[5] Petitioner sought review of the district court's denial of class certification under Federal Rule of Civil Procedure 23(f), but the Ninth Circuit declined to take jurisdiction over the interlocutory appeal. *See* Pet. App. 6a.

intent and regardless of whether Banc One's payment was in exchange for any services the broker provided. *See id.* at 37a. In reaching that conclusion, the district court deferred to a policy statement HUD issued in March 1999, which set forth a test for determining whether a payment by a lender to a mortgage broker violated RESPA § 8(a). *See id.* at 40a.[6] Under the district court's interpretation of that test, the yield spread premium Banc One paid did not violate § 8(a) if the broker performed some services for Schuetz and the total amount the broker received from Schuetz and Banc One was reasonable. *See id.* at 40a-42a. Finding that these two factors were satisfied, the district court granted summary judgment for Banc One. *See id.* at 42a-47a.

3. On June 19, 2001, petitioner appealed the district court's orders. On October 18, 2001, HUD published a policy statement purporting to clarify its 1999 Policy Statement. In its 2001 Policy Statement,[7] HUD opined that, when a court assesses whether a payment from a lender to a mortgage broker violates RESPA § 8(a), "it is necessary to look at each transaction individually," and not on a class-wide basis, to determine whether the total amount received by the broker (from the borrower and the lender) was reasonable. 66 Fed. Reg. at 53055; *see also id.* at 53054 ("The legality of any yield spread premium can only be evaluated in the context of the test HUD established and the specific factual circumstances applicable to each transaction in which a yield spread premium is used."). HUD also expressly disagreed with

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[6] HUD's test had two prongs: (1) whether "services were actually performed for the compensation paid"; and (2) whether "the payments are reasonably related to the value of the . . . services that were actually performed." 1999 Policy Statement, 64 Fed. Reg. at 10084.

[7] *Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b)*, 66 Fed. Reg. 53052 (2001) ("2001 Policy Statement").

the interpretation of HUD's 1999 Policy Statement in an Eleventh Circuit decision issued three months earlier. *See id.* at 53054-55. The Eleventh Circuit had affirmed a district court decision certifying a class where the evidence showed that the lender paid yield spread premiums "according to terms and conditions common to all the loans." *Culpepper v. Irwin Mortgage Corp.*, 253 F.3d 1324, 1332 (11th Cir. 2001) ("*Culpepper III*"), *cert. denied*, 534 U.S. 1118 (2002). The Eleventh Circuit had found that the lender's interpretation of the 1999 Policy Statement — the same interpretation HUD adopted in its 2001 Policy Statement — was "impossible with our, and possibly any ordinary, use of the English language." *Id.* at 1329.

Deferring to HUD's new policy statement, a divided Ninth Circuit panel affirmed the district court's decisions denying class certification and granting Banc One's motion for summary judgment. Citing *Barnhart v. Walton*, 122 S. Ct. 1265 (2002), *United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Christensen v. Harris County*, 529 U.S. 576 (2000), the panel majority found that the 2001 Policy Statement has the force of law and is entitled to *Chevron* deference, because RESPA § 19(a) authorizes HUD "to make such interpretations . . . as may be necessary to achieve the purposes of this chapter." 12 U.S.C. § 2617(a); *see* Pet. App. 13a-14a.[8] Relying on the Eighth Circuit's similar decision in *Glover v. Standard Federal Bank*,[9] the majority then found that

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[8] The Eleventh Circuit recently issued a decision in which it, too, found that it was required to grant *Chevron* deference to HUD's 2001 Policy Statement, which conflicted with its own, independent reading of RESPA's private right of action to permit certification of a class challenging a lender's payment of yield spread premiums. *See Heimmermann v. First Union Mortgage Corp.*, 305 F.3d 1257, 1261-63 (11th Cir. 2002) (reversing *Culpepper III*).

[9] 283 F.3d 953 (8th Cir.), *cert. denied*, No. 01-1648, 2002 WL 1013764 (Oct. 7, 2002). The Eighth Circuit, however, held that the 2001 Policy Statement did not warrant *Chevron* deference under *Mead* and *Christensen*, but deferred to HUD's interpretation of the

the interpretation of RESPA § 8 contained in that policy statement — which requires courts adjudicating a private right of action brought under § 8(d)(5) to conduct a loan-by-loan analysis of whether the total amount paid to the broker is reasonable — was not unambiguously precluded by the language of the statute and was reasonable. *See* Pet. App. 14a-16a. Finally, the majority affirmed both of the district court's rulings, finding that class certification was inappropriate in light of HUD's evidentiary standard, which "necessarily means that individual issues predominate," and that Banc One's payment to Schuetz's broker did not violate § 8(a), because the total payment to the broker "was consistent with local practice." *Id.* at 17a.

Judge Kleinfeld dissented. He rejected the majority's reasoning, concluding that the yield spread premium Banc One paid cannot be viewed "as payment for services rendered to the borrower, to be evaluated for reasonableness in each individual case," because "the relationship between the amount of the premium and the value of the services is entirely fortuitous." *Id.* at 18a. Because "the yield spread premium doesn't measure the value of services," Judge Kleinfeld would have permitted Schuetz's class action to go forward. *Id.*; *see also, e.g., id.* at 20a ("The HUD test . . . does not require that the yield spread premium be subtracted from the closing costs, so the borrower may not actually benefit from the increase in her interest rate."). Judge Kleinfeld also disputed the majority's characterization of the record, finding "[n]o evidence" that "the yield spread premium offset[] . . . closing costs" that Schuetz otherwise would have owed. *Id.* at 19a-20a. Finally, Judge Kleinfeld rejected the panel majority's willingness to defer to HUD's 2001 Policy Statement, concluding that "the yield spread premium is a kickback, . . . kickbacks are expressly prohibited by the statute," and the "express lan-

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scope of RESPA's private right of action under *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). *See* 283 F.3d at 961-62.

guage [of RESPA § 8(a)] cannot be interpreted away." *Id.* at 20a-22a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit majority's decision to grant *Chevron* deference to HUD's conclusion that a class action cannot be brought to remedy a lender's violation of RESPA § 8(a) through payment of yield spread premiums — like similar decisions by the Eighth and Eleventh Circuits — conflicts with this Court's determination that no such deference is warranted where, as here, "Congress has expressly established the Judiciary and not the [agency] as the adjudicator of private rights of action arising under the statute." *Adams Fruit*, 494 U.S. at 649. The court's judgment likewise conflicts with the decisions of numerous courts of appeals that have held, consistent with *Adams Fruit*, that agency interpretations "cannot establish the burden of proof in judicial proceedings." *Fabil Mfg. Co. v. United States*, 237 F.3d 1335, 1341 (Fed. Cir. 2001). The Court should grant certiorari to resolve this conflict and to ensure that tens of thousands of homebuyers are not deprived of their day in court by an agency interpretation that purports to instruct courts on the manner in which to apply Federal Rule of Civil Procedure 23 in determining whether a common issue of law or fact predominates.

I. THE NINTH CIRCUIT'S DEFERENCE TO HUD SANCTIONS AN IMPERMISSIBLE ENCROACHMENT BY THE AGENCY INTO PRIVATE RIGHTS OF ACTION IN CONFLICT WITH *ADAMS FRUIT* AND NUMEROUS CIRCUIT COURT DECISIONS

A. This Court's Precedents Prohibit Agencies From Exercising Their Authority To Regulate The Scope Of Statutorily Created Private Rights Of Action

In *Adams Fruit Co. v. Barrett*, this Court held that, when a statute creates a private right of action, the

courts "need not defer to the [agency's] view of the scope of [the statute] because Congress has expressly established the Judiciary and not the [agency] as the adjudicator of private rights of action arising under the statute." 494 U.S. at 649. In that case, the Department of Labor had issued an interpretation of the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), 29 U.S.C. §§ 1801 *et seq.*, through a notice-and-comment regulation stating that migrant workers could not bring a claim for bodily injury or death under the federal statute if a private remedy existed under a state's worker compensation law. *See* 494 U.S. at 649 (discussing 29 C.F.R. § 500.122(b) (1989)). In reaching the conclusion that the Department of Labor's regulation was not entitled to deference, the Court stressed that "Congress established an enforcement scheme independent of the Executive and provided aggrieved farmworkers with direct recourse to federal court where their rights under the statute are violated. Under such circumstances, it would be inappropriate to consult executive interpretations of [29 U.S.C.] § 1854 to resolve ambiguities surrounding the scope of AWPA's judicially enforceable remedy." *Id.* at 650.

This principle — that statutes ordinarily will not be construed to "empower the [agency] to regulate the scope of the judicial power vested by the statute" (*id.*) — is well settled. In *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726 (1973), for example, this Court applied that principle to reject an assertion of authority by the FMC to shield from antitrust liability those merger or acquisition agreements that do not impose certain ongoing responsibilities. "[A]n agency may not bootstrap itself into an area in which it has no jurisdiction," the Court held. *Id.* at 745. It was for the courts to determine whether such merger agreements ran afoul of antitrust laws. Similarly, the Court held in *SEC v. Sloan*, 436 U.S. 103 (1978), that the SEC could not, through an interpretation, convert its authority to issue an order suspending trading in securities for a

single 10-day period into authority to issue a series of consecutive orders akin to a court injunction suspending trading for more than one year, *see id.* at 119.

B. The Ninth Circuit's Decision Conflicts With *Adams Fruit* And This Court's Recent Administrative Law Decisions

1. The decision below cannot be reconciled with *Adams Fruit*'s direction that agencies must avoid interference with procedural rights

In both the nature of the statutory scheme and the degree of interference with the judicial role in enforcing it, RESPA and HUD's actions are directly analogous to the situation presented in *Adams Fruit*. Yet in rejecting class certification and applying HUD's 2001 Policy Statement as a binding rule that exonerated Banc One from liability, the Ninth Circuit misunderstood the parallels between the AWPA and RESPA, and ignored its responsibilities under Federal Rule of Civil Procedure 23 to ascertain common issues of fact and law.

a. RESPA provides an enforcement scheme virtually identical to the one addressed by this Court in *Adams Fruit*. Congress has provided multiple mechanisms for enforcing § 8(a)'s prohibition on kickbacks and referral fees. Any person violating § 8(a) is subject to criminal sanctions, including up to one year in prison. *See* 12 U.S.C. § 2607(d)(1). In addition, the statute expressly authorizes both the Secretary of HUD and certain state officials to bring actions to enjoin violations of § 8(a). *See id.* § 2607(d)(4). The Secretary has investigative authority, including subpoena authority, to aid in the enforcement of § 8(a). *See id.* § 2617(c). Finally, Congress created an express federal private right of action, which provides for treble damages, joint and several liability, and the possibility of recouping costs and attorney's fees. *See id.* §§ 2607(d)(2), (5), 2614. Congress established substantially the same four enforcement mechanisms in AWPA, *see* 29 U.S.C. §§ 1851-1854, and,

in *Adams Fruit*, a unanimous Court refused to grant *Chevron* deference to the Department of Labor's attempt through administrative action to interfere with the private right of action provided in the statute. *See* 494 U.S. at 649-50; *cf. Ragsdale v. Wolverine World Wide, Inc.*, 122 S. Ct. 1155, 1162 (2002) (refusing to defer to agency interpretation that "alters the [Family and Medical Leave Act of 1993's] [private right] of action in a fundamental way").

In giving *Chevron* deference to HUD's 2001 Policy Statement, the court below impermissibly allowed the agency to craft a rule of liability that encroaches on the judiciary's role to determine whether a yield spread premium like the one paid to Schuetz's broker constitutes an illegal kickback or referral fee in violation of RESPA § 8(a) by instructing courts on what evidence they could consider and how.[10] Although HUD has the authority generally to administer RESPA, *see* 12 U.S.C. § 2617(a), it does not administer the private right of action Congress established in § 8(d)(5) — and "it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'" *Adams Fruit*, 494 U.S. at 650 (quoting *Seatrain Lines*, 411 U.S. at 745). In the judicial administration of that private right of action, it is axiomatic that the courts — and not the administrative agency — have the responsibility to determine liability under the statute.

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[10] *See, e.g.*, 2001 Policy Statement, 66 Fed. Reg. at 53054 ("The legality of any yield spread premium can only be evaluated in the context of the test HUD established and the specific factual circumstances applicable to each transaction in which a yield spread premium is used."); *id.* at 53055 ("[T]o discern whether a yield spread premium was for goods, facilities or services under the first part of the HUD test, it is necessary to look at each transaction individually, including examining all of the goods or facilities provided or services performed by the broker in the transaction, whether the goods, facilities or services are paid for by the borrower, the lender, or partly by both."); *id.* ("[T]he Department believes that the second part of the test is applied by determining whether a mortgage broker's total compensation is reasonable.").

This encroachment on the proper role of the judiciary is even clearer in light of HUD's failure in the 2001 Policy Statement to construe a single word in RESPA § 8(a). Petitioner's theory — that respondent's payment of a yield spread premium is an illegal "kickback" or "referral fee" in violation of RESPA § 8(a) — cannot be answered authoritatively by HUD, particularly when the agency is not exercising its authority to clarify ambiguity in any of the plain terms of § 8(a).

b. HUD's encroachment, as sanctioned by the Ninth Circuit, is even more egregious in light of HUD's further effort to snuff out the class action procedural mechanism afforded under the Federal Rules and entrusted to the judiciary for proper enforcement and adjudication. Under Federal Rule of Civil Procedure 23(b)(3), a class action may be maintained if the court "finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." In holding that common issues of law and fact did not predominate, the Ninth Circuit majority did not base its analysis on any facts found by the district court — that court had found that Banc One pays yield spread premiums pursuant to "a standard lender-broker contract" that enables brokers "effectively [to] command [their] fee without input from Banc One." Pet. App. 30a, 59a.[11] Nor did the majority conduct its own analysis of RESPA or Rule 23. Rather, the court rested its judgment solely on deference to HUD's 2001 Policy Statement. *See id.* at 2a; *see also id.* at 17a (HUD's policy statement "necessarily means that individual issues predominate").

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[11] As noted above, despite these findings, the district court denied class certification on the ground that § 8(a) requires an inquiry into the intent of the borrower and the broker. *See* Pet. App. 70a-73a. The Eleventh Circuit subsequently rejected that rationale, *see Culpepper*, 253 F.3d at 1331-32 (finding it "bizarre"), and neither HUD, in the 2001 Policy Statement, nor the panel majority, in the decision below, relied on it.

Thus, in deferring to the agency's decision on what constitutes liability (according to HUD, a payment is illegal only if it is "unreasonable" regardless of whether it is a kickback or referral fee) and whether common issues of law and fact predominate (according to HUD, a challenge to a yield spread premium payment may be proved only on a "transaction by transaction" basis), the Ninth Circuit sanctioned HUD's impermissible encroachment on the judiciary's role to administer RESPA's private right of action.

2. The decision below errs in giving *Chevron* deference to HUD's 2001 Policy Statement

In *Adams Fruit*, this Court emphasized that the regulation was not a permissible construction entitled to *Chevron* deference because Congress had not evinced the intent to delegate authority to issue rules or policies determining the scope of enforcement in the statutory private right of action. *See* 494 U.S. at 649. That holding applies in the RESPA context as well. The Ninth Circuit erred in affording *Chevron* deference to HUD's 2001 Policy Statement. *See* Pet. App. 13a-14a.

a. The statute itself does not support a finding of *Chevron* deference. First, nothing in RESPA empowers HUD to offer an opinion about what evidence is necessary (or conversely, what evidence will be insufficient) to prove a RESPA violation. And there is nothing ambiguous about the terms "kickback" or "referral fees" in RESPA § 8(a). As Judge Kleinfeld noted in his dissent below, "I do not think we can properly defer to HUD's interpretation. First, the yield spread premium is a kickback, and kickbacks are expressly prohibited by the statute, which says that '[n]o person shall give and no person shall accept any . . . kickback.' That express language cannot be interpreted away." Pet. App. 20a (footnote omitted). Yet *Chevron* deference classically applies when the agency is offering an authoritative, considered construction of an ambiguous term in a statute. *See*,

e.g., *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 414 (1993).

Second, HUD's individual transaction test is inconsistent with the plain language of RESPA § 8(a), which provides that no kickback or referral fee shall be paid "pursuant to any agreement or understanding" when such agreements provide (as they do here) for uniform treatment of brokers. If, on the facts presented, respondent treats all brokers in its network identically in paying yield spread premiums for loans referred and does so pursuant to standard form contracts, it is completely inappropriate for HUD (and the Ninth Circuit below) to opine that each aggrieved consumer must nonetheless prove a § 8(a) violation on a transaction-by-transaction basis. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) ("[A] reviewing court should not defer to an agency position which is contrary to an intent of Congress expressed in unambiguous terms.").

Third, although Congress authorized HUD "to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of [RESPA]," 12 U.S.C. § 2617(a), Congress also provided that any such exemptions must be "specified in regulations prescribed by the Secretary, after consultation with the Attorney General" and five federal agencies, *id.* § 2607(c)(5). Even if these provisions could be understood to authorize HUD to administer the private right of action in § 8(d)(5), HUD did not follow those express procedural requirements in releasing the 2001 Policy Statement — it engaged in no public notice and comment, and failed to consult with other denominated agencies prior to issuing the new policy. Those provisions are not, contrary to the Ninth Circuit's judgment, irrelevant to whether the 2001 Policy Statement warrants *Chevron* deference. *See* Pet. App. 13a-14a. Where, as here, Congress has specified the form of agency action, the agency is not entitled to *Chevron* deference when it attempts to advance an interpretation

through a less formal means. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991) (agency interpretation in format other than that "expressly provided for by Congress" is "not entitled to the same deference" as interpretation in congressionally specified format).

Instead, the court focused on the facts that Congress authorized HUD "to make such interpretations . . . as may be necessary to achieve the purposes of [RESPA]," 12 U.S.C. § 2617(a), and that HUD's regulations provide that documents published in the Federal Register and identified by HUD as "'statements of policy'" pursuant to RESPA § 19(a) qualify for the safe harbor in § 19(b), *see* 24 C.F.R. § 3500.4(a)(1)(ii). Pet. App. 14a. Neither the mention of "interpretations" in § 19(a) nor HUD's regulation, however, provides the necessary "delegation regarding [RESPA's] enforcement provisions" that is a "precondition to deference under *Chevron*." *Adams Fruit*, 494 U.S. at 649-50.[12]

b. Although the opinion below cites this Court's relevant administrative law precedents — namely, *Mead*, *Barnhart*, and *Christensen*, *see* Pet. App. 13a-14a — it misapplies them. Properly understood, those cases deny giving *Chevron* deference to HUD's 2001 Policy Statement.

HUD's authority to issue "interpretations" under § 19(a) is no different from the Treasury Secretary's authority to "'establish[] procedures for the issuance of

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[12] The Secretary of Labor had similar authority to administer AWPA, which this Court found insufficient to warrant granting *Chevron* deference to the Secretary's interpretation of AWPA's private right of action. *See* 29 U.S.C. § 1861 ("Secretary may issue such rules and regulations as are necessary to carry out this chapter"); *id.* § 1841(d) (requiring promulgation of regulations containing standards implementing AWPA's motor vehicle safety provisions); *see also Salinas v. Rodriguez*, 963 F.2d 791, 793 & n.3 (5th Cir. 1992) (agency may also issue interpretive bulletins setting forth "the construction of the law which the administrator believes to be correct and which will guide him") (internal quotation marks omitted).

binding rulings,'" which the *Mead* Court found insufficient to demonstrate that Congress delegated the authority to issue informal rulings that have the force of law. 533 U.S. at 231-33 (quoting 19 U.S.C. § 1502(a)). Letter rulings issued pursuant to those procedures are "subject to modification or revocation" by Customs, but until modified "may be cited as authority in the disposition of transactions involving the same circumstances." 19 C.F.R. § 177.9(a), (c). Nonetheless, this Court found that such "precedential value alone does not add up to *Chevron* entitlement; interpretive rules may sometimes function as precedents, and they enjoy no *Chevron* status as a class." *Mead*, 533 U.S. at 232 (citation omitted).

Like the letter rulings at issue in *Mead*, HUD's policy statements are promulgated without prior notice and comment. HUD's regulations also provide that such policy statements may be amended or revoked at any time, simply through publication of a subsequent statement in the Federal Register. *See* 24 C.F.R. § 3500.4(a)(1)(ii). The precedential value of such policy statements is limited as well by the fact that the safe harbor does not apply to actions taken after any such "interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason." 12 U.S.C. § 2617(b). Indeed, the Government has conceded that interpretations issued pursuant to § 19(a) are "not binding." *United States v. Graham Mortgage Corp.*, 740 F.2d 414, 421-22 (6th Cir. 1984); *see also id.* at 422-23 (rejecting government's proposed interpretation under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).[13]

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[13] In any event, because respondent paid a yield spread premium to petitioner's broker in 1997, it could not have acted "in good faith in conformity" with the 2001 Policy Statement. 12 U.S.C. § 2617(b). The same is true of the majority of the other potential class members. As to potential class members whose loans closed after October 18, 2001, the safe harbor does not apply because the district court found that respondent "does not review" the broker's total compensation. Pet. App. 29a.

Nor does this Court's more recent decision in *Barnhart* support the Ninth Circuit majority's reasoning. In that case, the Court deferred to the agency's notice-and-comment regulation. *See* 122 S. Ct. at 1269-71. The Court then found that the agency's earlier, informal statements of that same interpretation also warranted *Chevron* deference, but only because "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* [deference is] appropriate." *Id.* at 1272. Here, the legal question is not "interstitial" — what constitutes an illegal referral fee is central to the statute; it is sufficiently important that HUD twice tried (without success) to promulgate formal regulations on the subject;[14] and whether the fee must be in exchange for services is not particularly complex. Nor was the 2001 Policy Statement the result of consideration "over a long period of time" — rather, it was a hasty effort to overrule the Eleventh Circuit's decision in *Culpepper III* as part of a deal with the mortgage industry, under which the industry "would support a HUD rule requiring improved fee disclosure" if HUD issued a "clarification" repudiating *Culpepper III*. *Real Estate Settlement Procedures Act (RESPA); Simplifying and Improving the Process of Obtaining Mortgages To Reduce Settlement Costs to Consumers; Proposed Rule*, 67 Fed. Reg. 49134, 49143 (2002) ("2002 Notice"). Indeed, as noted below, in litigation to enforce § 8(a), HUD took the opposite position shortly *before* the issuance of the 2001 Policy

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[14] *See Real Estate Settlement Procedures Act (RESPA) Disclosure of Fees Paid to Mortgage Brokers; Proposed Rule and Notice of Proposed Information Collection Requirements*, 62 Fed. Reg. 53912 (1997) ("1997 Notice"); *see also Mortgage Broker Fee Disclosure Rule: Intent to Establish a Negotiated Rulemaking Advisory Committee and Notice of First Meeting; Proposed Rule*, 60 Fed. Reg. 54794 (1995) ("1995 Negotiated Rulemaking").

Statement; and shortly *afterward*, HUD provided in its 2002 Notice that "class relief" would be available to remedy a § 8(a) violation. *See infra* pp. 23-24.

c. RESPA itself refutes any notion that Congress intended for informal interpretations of the Act to carry the force of law, which is a precondition to an agency's entitlement to *Chevron* deference. *See Mead*, 533 U.S. at 229-31; *Christensen*, 529 U.S. at 587. Although this Court has made clear that notice-and-comment rulemaking is not a necessary condition for granting *Chevron* deference, *see Mead*, 533 U.S. at 231, it also has stressed that "Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force," *id.* at 230.

HUD's authority "to make . . . interpretations" appears in the statute between its authority "to prescribe . . . rules and regulations" and "to grant . . . reasonable exemptions for classes of transactions." 12 U.S.C. § 2617(a). Any rules and regulations, of course, must be promulgated pursuant to the notice-and-comment procedures set forth in the Administrative Procedure Act ("APA"). With respect to exemptions, Congress provided that they, too, must be "specified in regulations." *Id.* § 2607(c)(5). HUD must also "consult[] with" the Attorney General and five separate agencies before granting any such exemption, which HUD failed to do prior to issuing the 2001 Policy Statement. *Id.*[15]

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[15] The location of the term "interpretations" — appearing between two other grants of authority that require the use of formal rulemaking procedures — indicates that Congress did not intend to delegate to HUD the authority to issue informal interpretations that carry the force of law. *See, e.g., Gutierrez v. Ada*, 528 U.S. 250, 255 (2000). More specifically, the fact that Congress required HUD to go beyond the normal requirements of notice-and-comment rulemaking to establish additional exemptions under § 8(c) provides an even stronger indication that Congress did not intend for HUD's informal interpretations of the existing exemptions in § 8(c) to carry the force of law.

The Ninth Circuit majority excused HUD's informal process on the ground that "[n]othing suggests that the more formal process of notice and comment was short-circuited for any reason other than Congress's directive to issue the 1999 Statement of Policy within 90 days." Pet. App. 14a.[16] As an initial matter, when the Ninth Circuit majority "says 'Congress' told HUD to do this, it refers to [a] conference committee report, not an act of Congress." *Id.* at 21a n.12 (Kleinfeld, J., dissenting). In any event, the Ninth Circuit majority deferred not to the 1999 Policy Statement, but to the 2001 Policy Statement, which was issued long after the conference committee report and for which there was no reason for HUD to forgo notice-and-comment rulemaking.

3. HUD's 2001 Policy Statement is not entitled to *Skidmore* consideration either

In *Mead*, this Court confirmed that an agency interpretation that is not entitled to *Chevron* deference still warrants "respect proportional to its 'power to persuade.'" 533 U.S. at 235 (quoting *Skidmore*, 323 U.S. at 140). As explained below, no special consideration is

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Accordingly, as in *Mead*, "the terms of the congressional delegation [in RESPA] give no indication that Congress meant to delegate authority" to HUD to issue policy statements without notice-and-comment rulemaking that have "the force of law." 533 U.S. at 231-32.

[16] Indeed, the attempt to evade the requirements of *Mead* and *Christensen* is especially apparent here, because HUD twice tried (and failed) to promulgate formal regulations that would have established a test to distinguish, based on brokers' "total compensation," "between those fees that are acceptable under section 8 of RESPA and those that are not." 1997 Notice, 62 Fed. Reg. at 53913; *see also* 1995 Negotiated Rulemaking, 60 Fed. Reg. at 54796. In its 1997 Notice, HUD explained that "[a] major purpose of soliciting public comments . . . is to assist HUD in developing this test." 62 Fed. Reg. at 53913. HUD never promulgated the regulations contemplated by its 1997 Notice. Instead, in its 2001 Policy Statement, HUD simply announced the very test that it had previously been incapable of establishing through notice-and-comment procedures and "incorporat[ing] in [a] final rule." *Id.* at 53921.

due to HUD's conclusions in the 2001 Policy Statement with respect to the appropriateness of class certification in cases brought to enforce § 8(a) or in fashioning a test to determine liability thereunder.

a. HUD has no expertise with respect to Rule 23. *See id.* ("[s]uch a ruling may surely claim the merit of its writer's . . . expertness"). The 2001 Policy Statement was expressly designed to overrule the Eleventh Circuit's conclusion that, where a lender pays yield spread premiums "according to terms and conditions common to all the loans," "common questions of law and fact predominate" and a class can be certified under Rule 23(b)(3). *Culpepper III*, 253 F.3d at 1332; *see* 2001 Policy Statement, 66 Fed. Reg. at 53053, 53054-55. Moreover, any claim to expertise is particularly tenuous here, because HUD has since acknowledged that its 2001 Policy Statement was part of a deal with the mortgage industry. *See* 2002 Notice, 67 Fed. Reg. at 49143; *supra* p. 20

b. HUD's position that § 8(a) claims must be evaluated on a loan-by-loan basis is inconsistent with HUD's own actions to enforce § 8(a). Not only is consistency with past agency pronouncements of "paramount importance" under *Skidmore*, *Graham Mortgage*, 740 F.2d at 422, but maintaining consistency in the "standards of public enforcement and those for determining private rights" was one factor the *Skidmore* Court specifically identified in granting special consideration to an agency's views, 323 U.S. at 140. Yet, while HUD's 2001 Policy Statement attempts to prevent individuals from remedying violations of § 8(a) on a class-wide basis, HUD insists that it has such authority. For example, in March 2000, HUD brought suit to enforce § 8(a) against a mortgage lender based on that lender's standard practices, rather than any loan-by-loan analysis. *See* Complaint, *United States v. Delta Funding Corp.*, No. CV-00-1872 (E.D.N.Y. Mar. 30, 2000), *available at* http://www.ftc.gov/os/2000/03/deltacmp.pdf. As part of a

settlement, HUD required the lender to alter those practices to ensure that any payments to a broker are "made in exchange for services actually performed." Settlement Agreement and Order, *United States v. Delta Funding Corp.*, No. CV-00-1872 (E.D.N.Y. Mar. 30, 2000), *available at* http://www.ftc.gov/os/2000/03/deltasettlement.pdf. And HUD has recently reiterated that, as a matter of its "enforcement priorit[ies]," violators of § 8 should be subject to "penalties as well as individual or class relief." 2002 Notice, 67 Fed. Reg. at 49155. The effect of HUD's solitary 2001 Policy Statement opinion, therefore, has been to whipsaw innocent consumers, who have seen their class action suits decertified or dismissed by courts of appeals giving deference to the 2001 Policy Statement, while the agency itself felt no compunction less than a year later about issuing a totally contrary position.

c. RESPA itself contemplates that class actions can be brought to enforce § 8(a). That section prohibits any fee or kickback paid "pursuant to any agreement or understanding." 12 U.S.C. § 2607(a); *see also* 24 C.F.R. § 3500.14(e) (providing that "[a]n agreement or understanding for the referral of business incident to or part of a settlement service . . . may be established by a practice, pattern or course of conduct"). The district court here found that respondent has a uniform practice of paying yield spread premiums pursuant to standard agreements with its affiliated brokers. Accordingly, common issues of law and fact predominate and warrant class certification.[17] Furthermore, in RESPA § 6, Congress expressly capped the damages that could be

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[17] Nor does § 8(c)(2) — which states "[n]othing in [§ 8] shall be construed as prohibiting . . . the payment to any person of . . . compensation . . . for services actually performed," 12 U.S.C. § 2607(c)(2) — preclude the certification of a class under § 8(a) where, as Judge Kleinfeld recognized is the case here, the evidence shows that the yield spread premiums that Banc One paid "ha[ve] nothing to do with how much work the broker does" and thus are not "compensation . . . for services." Pet. App. 19a.

awarded in a class action brought to enforce provisions contained in that section. *See id.* § 2605(f)(2). Congress did not, however, cap damages or otherwise limit the use of class actions to enforce § 8(a), thus evincing an intent to allow such actions to proceed.[18]

C. The Ninth Circuit's Decision Conflicts With Other Circuits That Reject *Chevron* Deference To Agencies That Interfere With Judicially Enforceable Procedural Rights

Not only is the Ninth Circuit's holding — as well as the similar holdings of the Eighth and Eleventh Circuits — inconsistent with this Court's decisions in *Adams Fruit*, *Christensen*, *Mead*, and *Barnhart*, but it also conflicts with decisions of the First, Fifth, Tenth, D.C, and Federal Circuits. Those circuits have refused to accord *Chevron* deference on matters within the scope of the judiciary's authority. For example, the D.C. Circuit has held that, while the Environmental Protection Agency ("EPA") is entitled to *Chevron* deference when it orders a party to remedy the effects of hazardous waste under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), the agency's view is entitled to no deference when that party brings an independent civil action for reimbursement against those responsible for the contamination.

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[18] Petitioners do not contend — nor need this Court find — that yield spread premiums are illegal *per se*. A lender could legally pay a yield spread premium if it entered into agreements that required brokers to inform borrowers of the option of financing some or all of their closing costs by accepting an above-par interest rate and if it took steps to ensure that brokers actually used the entirety of the yield spread premium to offset the closing costs that the borrower otherwise would have owed to the broker. In fact, HUD has recently proposed rules that would require yield spread premiums to be paid in exactly this manner (and only this manner): under the proposed rules, "payments based upon an above par interest rate on the loan (including payments formerly denominated as yield spread premium[s])" must be "applied as a credit to reduce the borrower's total origination charges" and "reported . . . as a lender payment to the borrower." 2002 Notice, 67 Fed. Reg. at 49147-48.

See Kelley v. EPA, 15 F.3d 1100, 1107 (D.C. Cir. 1994). As that court explained, because questions of liability "can be put at issue in federal court by disputing private parties — without any government involvement" — "it cannot be argued that Congress intended EPA . . . to have authority to, by regulation, define liability for a class of potential defendants." *Id.* The court further held that, "even if an agency enjoys authority to determine such a legal issue administratively" — and HUD has no such authority — "deference is withheld if a private party can bring the issue independently to federal court under a private right of action." *Id.* at 1108. That is the case here: Judge Kleinfeld, in dissent below, noted that "[n]o evidence" in the case supported the legality of this particular payment. Pet. App. 19a. Blindly deferring to HUD, the majority simply saw no need to examine the evidence.

Other circuits, however, have similarly circumscribed deference to agencies that seek, as HUD did here, to encroach on matters within the judiciary's proper province. Indeed, the Federal Circuit rejected the Customs Service's attempt, through an interpretation, to require importers to present clear and convincing evidence to prevail in a challenge to a Customs ruling before the Court of International Trade. *See Fabil Mfg.*, 237 F.3d at 1340-41. The court held that it was not required to defer to Customs' interpretation because "Customs cannot establish the burden of proof in judicial proceedings; that task is for the judiciary or the Congress." *Id.* at 1341. The First Circuit likewise refused to defer to the Department of Labor's regulations purporting to exclude an administrative adjudication from the scope of the attorney's fees provisions of the Equal Access to Justice Act ("EAJA"), finding that "eligibility for attorney's fees under the EAJA is not within the Department of Labor's particular knowledge." *Dantran, Inc. v. United States Dep't of Labor*, 246 F.3d 36, 47-48 (1st Cir. 2001). And, both the Fifth and Tenth Circuits have found that no deference is due to an agency's determinations regard-

ing the preclusive effect of a state court decision under full faith and credit principles. *See Arapahoe County Pub. Airport Auth. v. FAA*, 242 F.3d 1213, 1219 & n.7 (10th Cir.), *cert. denied*, 122 S. Ct. 664 (2001); *American Airlines, Inc. v. Department of Transp.*, 202 F.3d 788, 799-800 (5th Cir.), *cert. denied*, 530 U.S. 1274, 1284 (2000).

D. Resolving These Conflicts Is Critically Important

This case presents an ideal vehicle for the Court to resolve this conflict over the ability of an agency to encroach upon the judiciary's role in adjudicating private rights of action and to provide the courts of appeals with further, and much-needed, guidance as to when, based on "the interpretive method used and the nature of the question at issue," an agency's informal interpretation of a statute warrants *Chevron* deference. *Barnhart*, 122 S. Ct. at 1272. Numerous statutes administered by agencies contain private rights of action, and the APA authorizes all such agencies to issue interpretive rules. As a result, the conflicts deepened by the decision below cast greater uncertainty on the deference to be afforded in those statutory contexts.

Moreover, there is great practical significance for consumers in the Court's resolution of this conflict. Thousands of homebuyers every day are unwittingly suffering from the illegal kickback scheme employed by Banc One and other lenders. As Judge Kleinfeld noted powerfully in dissent below, "The home buyer hires a mortgage broker to shop for a good loan for her, but the broker takes $500 from a lender to steer the buyer to the lender, if the buyer can be persuaded to sign a loan with interest above par. This is how the 'yield spread premium' is calculated. The measure has nothing to do with how much work the broker does. Instead, it is based on one thing: how far above par the interest rate is." Pet. App. 18a-19a.

The rights of homebuyers individually to assert a claim for liability are thwarted by the Ninth Circuit's judgment that the 2001 Policy Statement allows lenders to escape liability so long as the "total compensation, including direct as well as indirect fees, was consistent with local practice and reasonably related to the value that Home Financial contributed to Schuetz's transaction." *Id.* at 17a. And their rights to join collectively as a class to challenge practices that individually do not warrant the expense of federal litigation are blocked by HUD's opinion that liability may be proved only by "look[ing] at each transaction individually." *Id.* at 11a (internal quotation marks omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-16206

BETTINA J. SCHUETZ,
Plaintiff/Appellant,

v.

BANC ONE MORTGAGE CORPORATION,
Defendant/Appellee.

Appeal from the United States District Court
for the District of Arizona
Robert C. Broomfield, District Judge Presiding

Argued and Submitted: March 11, 2002
Filed: June 10, 2002

Before: PAMELA ANN RYMER, ANDREW J. KLEINFELD AND M. MARGARET McKEOWN, Circuit Judges.

OPINION

RYMER, Circuit Judge:

This appeal requires us to decide whether yield spread premiums, which are fees paid by mortgage lenders to mortgage brokers that are based on the difference between the interest rate at which the broker originates the loan and the par, or market rate offered by the lender, are lawful under the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601 *et seq.* (West 2001). RESPA prohibits the giving or receiving of fees for referral as part of a real estate settlement service

but permits fees that are paid for facilities actually furnished or services actually performed in the making of a loan. RESPA, § 8(a), (c)(2); 12 U.S.C. § 2607(a), (c)(2).

Bettina J. Scheutz obtained a federally related mortgage loan from Banc One Mortgage Corporation through a mortgage broker, Home Mortgage Financial Corporation. She paid Home Mortgage direct fees and Banc One paid it a yield spread premium. She brought a class action challenging the yield spread premium payment as contrary to § 8(a).

We do not write on a clean slate in deciding whether the yield spread premium was a referral, because the Department of Housing and Urban Development (HUD), which is charged with enforcing RESPA, has prescribed a test for determining the propriety of a yield spread premium payment. It asks whether services were actually performed for the total compensation paid to the mortgage broker, and whether that compensation is reasonably related to the services provided. The district court deferred to this test, correctly we believe, and declined to certify a class of borrowers for lack of a common question of fact. It then granted summary judgment in favor of Banc One on Scheutz's claim that its payment of the yield spread premium was really for a referral of business by Home Mortgage. The court concluded that the broker performed services that contributed to the transaction, and that Home Mortgage's total compensation (of which the yield spread premium was a part) was reasonably related to the services provided. We agree with these rulings.

As we have jurisdiction, 28 U.S.C. § 1291, we affirm.

I

When Schuetz found a house that she wanted to buy in the Sun Lakes Country Club development in Sun Lakes, Arizona, she hired Home Mortgage Financial Corporation, a mortgage broker, to arrange a loan. Mortgage brokers are intermediaries who bring borrow-

er and lender together. Borrowers typically approach the mortgage settlement process with a variety of individual characteristics and needs, including their credit rating, income, sensitivity to interest rate variations, and preference for paying charges up front or spreading them out in the form of a higher interest rate. Brokers furnish numerous services to consumers;[1] in Schuetz's

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[1] These services were first catalogued in a HUD letter to the Independent Bankers Association of America, dated February 14, 1995, and were listed again in HUD's Statement of Policy 1999-1. They include:

(a) Taking information from the borrower and filling out the application;

(b) Analyzing the prospective borrower's income and debt and pre-qualifying the prospective borrower to determine the maximum mortgage that the prospective borrower can afford;

(c) Educating the prospective borrower in the home buying and financing process, advising the borrower about the different types of loan products available, and demonstrating how closing costs and monthly payments could vary under each product;

(d) Collecting financial information (tax returns, bank statements) and other related documents that are part of the application process;

(e) Initiating/ordering VOEs (verifications of employment) and VODs (verifications of deposit);

(f) Initiating/ordering requests for mortgage and other loan verifications;

(g) Initiating/ordering appraisals;

(h) Initiating/ordering inspections or engineering reports;

(i) Providing disclosures (truth in lending, good faith estimate, others) to the borrower;

(j) Assisting the borrower in understanding and clearing credit problems;

(k) Maintaining regular contact with the borrower, realtors, lender, between application and closing . . . and gather any additional needed information . . . ;

(l) Ordering legal documents;

(m) Determining whether the property was located in a flood zone . . . ; and

case, Home Mortgage analyzed her income and debt, explained the loan process and loan products available to her, collected her financial information, obtained a credit report on her behalf, secured an appraisal, prepared her loan package, and submitted it to Banc One. Mortgage brokers are compensated in several ways for their services. Compensation from the borrower to the broker is a direct fee, while money that the borrower pays the lender and the lender pays the broker is an indirect fee. Because lending institutions such as Banc One offer intermediaries options in structuring their compensation, brokers in effect determine their own compensation for any particular transaction by choosing the combination of loan characteristics and prices to offer a consumer.

A broker selects a loan product from among the various loans offered by the lending institutions with which it maintains a relationship. According to Home Mortgage, loans are selected based on the lender's service, turnaround time, ability to make the required funds available, reputation in the community, level of professionalism, reputation with the banking department, competitive rates, underwriting flexibility, and the availability of products.

Home Mortgage obtained Schuetz a 30-year loan in the principal amount of $68,000 with a 7.5% interest rate from Banc One, which is a wholesale lender. This was above Banc One's par rate. "Par rate" refers to the rate at which the lender will fund 100% of a loan with no premiums or discounts to the broker. For each loan product, Banc One estimates the secondary market value of a model loan and derives a "par" price (taking into account its own costs and return requirements) that it uses in developing rate sheets for brokers. If the

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(n) Participating in the loan closing.

Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, 64 Fed. Reg. 10080, 10085 (March 1, 1999) (footnotes omitted).

interest rate on a particular loan exceeds the rate assumed by Banc One's par price model, Banc One will pay the broker a "yield spread premium" equal to the value of the additional interest.

A yield spread premium, or "YSP," is a lump sum paid by a lender to a broker at closing when the loan originated by the broker bears an above-par interest rate. As HUD has explained it:

> Payments to brokers by lenders, characterized as yield spread premiums, are based on the interest rate and points of the loan entered into as compared to the par rate offered by the lender to the mortgage broker for that particular loan (e.g., a loan of 8% and no points where the par rate is 7.50% will command a greater premium for the broker than a loan with a par rate of 7.75% and no points). In determining the price of a loan, mortgage brokers rely on rate quotes issued by lenders, sometimes several times a day. When a lender agrees to purchase a loan from a broker, the broker receives the then applicable pricing for the loan based on the difference between the rate reflected in the rate quote and the rate of the loan entered into by the borrower. . . .
>
> Lender payments to mortgage brokers may reduce the up-front costs to consumers. This allows consumers to obtain loans without paying direct fees themselves. Where a broker is not compensated by the consumer through a direct fee, or is partially compensated through a direct fee, the interest rate of the loan is increased to compensate the broker or the fee is added to principal. In any of the compensation methods described, all costs are ultimately paid by the consumer, whether through direct fees or through the interest rate.

1999 Statement of Policy, 64 Fed. Reg. at 10081 (footnotes omitted).

In this case, Schuetz paid her broker direct fees of $1,661.00, consisting of $688.00 for loan origination,

$688.00 for loan discount, and $285.00 for processing. Banc One also paid Home Mortgage a yield spread premium of $516.00. This payment was identified on Schuetz's HUD-1 Settlement Statement as "Mortgage Broker fee to Home Mortgage from BANC ONE."[2]

Schuetz sued Banc One on behalf of a class of borrowers whose loan settlements included a yield spread premium payment, claiming that the YSP violates RESPA because it is a kickback for referral of a federally related mortgage loan.[3]

She sought class certification, which the district court denied. It concluded that the issue on which this litigation would turn is whether the yield spread premiums paid by Banc One are compensation for facilities or services actually performed, and decided that this issue was too fact intensive to be resolved on a class-wide basis. We declined to take an interlocutory appeal from the order denying certification.

Cross-motions for summary judgment resulted in judgment for Banc One. The district court held that HUD's 1999 Statement of Policy guided the outcome because Congress authorized HUD to promulgate rules and regulations to implement RESPA, and to interpret the statute. Applying HUD's test for legality of yield spread premium payments, the court found it undisputed that compensable services were performed by Home Mortgage and that they were worth what the broker was paid. Accordingly, the court concluded that no RESPA violation occurred.

Schuetz appeals both orders.

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[2] A HUD-1 Settlement Statement is a form that lenders must provide to borrowers to identify all settlement (or closing) costs on a federally related mortgage loan. 12 U.S.C. § 2603 (West 2001).

[3] Other claims for violating federal and state law were dismissed and no appeal is taken as to them. Other parties, both plaintiff and defendant, were also dismissed.

II

In a nutshell, Schuetz contends that the direct fees which she paid fully compensated Home Mortgage for the services it performed and that the yield spread premium paid by Banc One, which was not tied to — or in exchange for — any particular services, is necessarily a fee for referral. In her view, HUD and the district court got the liability test wrong, and the Eleventh Circuit got it right in *Culpepper v. Irwin MortgageCorp.*, 253 F.3d 1324 (11th Cir. 2001). Banc One counters that HUD's test is binding and that courts must defer to it.

The backdrop is cumbersome but important.

A

Congress enacted RESPA in 1974 to protect home buyers from inflated prices in the home purchasing process. It sought to increase the supply of information available to mortgage consumers about the cost of home loans in advance of settlement, and to eliminate abusive practices such as kickbacks, referral fees, and unearned fees. To accomplish the first purpose, the Act requires lenders to provide borrowers with a statement identifying all settlement charges on a standardized form, commonly known as a "HUD-1," 12 U.S.C. § 2603 (West 2001), and with an information booklet prepared by HUD that counsels borrowers on how mortgage transactions work and how to recognize inflated charges. *Id.* at § 2604.

Sections 8(a) and 8(c)(2) are the provisions primarily at issue in this case. Section 8(a) prohibits fees for referrals. It provides: "No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a). Section 8(c)(2) provides: "Nothing in this section shall be construed as prohibiting . . . the payment to any person of a bona fide salary or

compensation or other payment for goods or facilities actually furnished or for services actually performed . . . ." *Id.* § 2607(c)(2).

HUD is the administrative agency charged with enforcing RESPA. It is authorized by statute to prescribe rules and regulations, and to make interpretations of RESPA. 12 U.S.C. § 2617(a). HUD has issued regulations pursuant to this authority. *See* "Regulation X," 24 C.F.R. § 3500.1 *et seq.* Section 3500.14 pertains to kickbacks and unearned fees that are prohibited by § 8 of the statute. This regulation proscribes referral fees, 24 C.F.R. § 3500.14(b),[4] and defines a "referral" as "any oral or written action . . . which has the effect of affirmatively influencing the selection by any person of a provider of a settlement service or business incident to or part of a settlement service when such person will pay for such settlement service or business incident thereto or pay a charge attributable in whole or in part to such settlement service or business." *Id.* at § 3500.14(f)(1). The regulations also implement § 8(c)(2) of the Act by providing that "[a] payment to any person

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[4] Section 3500.14(b) provides:

> No person shall give and no person shall accept any fee, kickback or other thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or part of a settlement service involving a federally related mortgage loan shall be referred to any person. Any referral of a settlement service is not a compensable service, except as set forth in § 3500.14(g)(1). A business entity (whether or not in an affiliate relationship) may not pay any other business entity or the employees of any other business entity for the referral of settlement service business.

24 C.F.R. § 3500.14(b). Subsection (e) further provides:

> An agreement or understanding for the referral of business incident to or part of a settlement service need not be written or verbalized but may be established by a practice, pattern or course of conduct. When a thing of value is received repeatedly and is connected in any way with the volume or value of the business referred, the receipt of the thing of value is evidence that it is made pursuant to an agreement or understanding for the referral of business.

Id. at § 3500.14(e).

of a *bona fide* salary or compensation or other payment for goods or facilities actually furnished or for services actually performed" is permissible. *Id.* at § 3500.14(g)(1)(iv).

Sections 8(a) and (c)(2) of RESPA generated a considerable amount of litigation. In light of the legal uncertainty about lender payments to mortgage brokers for services performed, Congress directed HUD to address the issue within 90 days of October 21, 1998 (the date on which the Department's 1999 appropriations bill was enacted). *See* Conference Report on the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999, H.R. Conf. Rep. No. 105-769 (1998), *reprinted in* U.S.C.C.A.N. 539, 568.

Meanwhile, the Eleventh Circuit Court of Appeals rendered its first opinion in the *Culpepper* litigation. *Culpepper v. Inland Mortgage Corp. (Culpepper I)*, 132 F.3d 692 (11th Cir. 1998). The Culpeppers had obtained a federally insured home mortgage from Inland Mortgage Corporation through their mortgage broker at an interest rate of 7.5%. Unbeknownst to them, this was over Inland's par rate and carried a yield spread premium of $1,263.61 even though Inland would have made the same loan at 7.25% with a YSP of only $97.20. They challenged the yield spread premium on the footing that it was not tied to services but to the size and interest rate of their loan. The court agreed that the only service for which the YSP was compensation was the "service" of referring an above par loan to the lender, which RESPA does not permit.[5]

HUD issued a Statement of Policy March 1, 1999 after consulting industry groups, federal agencies, consumer groups and other interested parties. 1999 Statement of Policy, 64 Fed. Reg. at 10084. The heart of HUD's

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[5] The court denied Inland's petition for rehearing in a published opinion. *Culpepper v. Inland Mortgage Corp. (Culpepper II)*, 144 F.3d 717 (11th Cir. 1998).

position is that lender payments to mortgage brokers are not illegal per se; yield spread premium payments may be legal (or illegal) in individual cases or classes of transactions. *Id.* Accordingly, the Policy Statement prescribes the following test:

> In determining whether a payment from a lender to a mortgage broker is permissible under Section 8 of RESPA, the first question is whether goods or facilities were actually furnished or services were actually performed for the compensation paid. The fact that goods or facilities have been actually furnished or that services have been actually performed by the mortgage broker does not by itself make the payment legal. The second question is whether the payments are reasonably related to the value of the goods or facilities that were actually furnished or services that were actually performed.
>
> In applying this test, HUD believes that total compensation should be scrutinized to assure that it is reasonably related to goods, facilities, or services furnished or performed to determine whether it is legal under RESPA. Total compensation to a broker includes direct origination and other fees paid by the borrower, indirect fees, including those that are derived from the interest rate paid by the borrower, or a combination of some or all. The Department considers that higher interest rates alone cannot justify higher total fees to mortgage brokers. All fees will be scrutinized as part of total compensation to determine that total compensation is reasonably related to the goods or facilities actually furnished or services actually performed. HUD believes that total compensation should be carefully considered in relation to price structures and practices in similar transactions and in similar markets.

Id.

After HUD's 1999 Policy Statement was issued, Inland (by then known as Irwin) appealed certification of a

class of borrowers on whose loans it had paid a yield spread premium to the mortgage broker. *Culpepper v. Irwin Mortgage Corp. (Culpepper III)*, 253 F.3d 1324 (11th Cir. 2001). Irwin argued that the Policy Statement overruled *Culpepper I*'s interpretation of § 8(a). The court rejected that argument, as well as the lender's contention that the legality of a YSP payment could only be determined loan transaction by loan transaction. It held that the test for § 8 liability is not whether the broker performed *some* services, but whether the YSP is payment *for* those services. Otherwise, the Policy Statement's requirement that payment be "for compensation paid" would not be met; the result would be inconsistent with § 8(c) because the preposition "for" connotes an exchange and the word "fee" implies a money-services exchange to be within § 8(c); and it would permit payments under the guise of § 8(c) that § 8(a) plainly prohibits.

HUD then issued another Statement of Policy "to eliminate any ambiguity concerning the Department's position with respect to those lender payments to mortgage brokers characterized as yield spread premiums . . . as a result of questions raised by . . . Culpepper v. Irwin Mortgage Corp." Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b), 66 Fed. Reg. 53052 (October 18, 2001). The 2001 Statement explicitly rejects *Culpepper*'s interpretation, and reiterates the position taken in the 1999 Statement — that yield spread premiums are not per se legal or illegal and that this turns on meeting the requirements of its two-prong test.

The 2001 Statement indicates that under the first prong, "it is necessary to look at each transaction individually, including examining all of the goods or facilities provided or services performed by the broker in the transaction, whether the goods, facilities or services are paid for by the borrower, the lender, or partly by both."

Id. at 53055. It further states that a yield spread premium may not be presumed to be a referral fee based solely on the fact that the lender makes such a payment to a broker. *Id.* The 2001 Statement notes that yield spread premiums are by definition derived from the interest rate and that this, by itself, does not indicate whether a particular YSP is a payment for facilities actually furnished or services actually performed. *Id.* HUD also makes clear that the first part of its test does not contemplate identifying or allocating which facilities, goods or services are performed for the lender or for the borrower as all of them inure to the benefit of both. *Id.* In addition, the 2001 Statement advises that the list of services provided in the 1999 Statement, while not exhaustive, is still accurate, and that compensation for them may be paid either by the borrower or the lender or partly by both. However, "[c]ompensable services for the first part of the test do not include referrals or no, nominal, or duplicative work." *Id.*

The 2001 Statement essentially repeats the considerations that HUD set out in the 1999 Statement for resolving the second, or reasonableness, part of the test. In sum, the pivotal question is whether a mortgage broker's total compensation is reasonable. Total compensation includes fees paid by a borrower and any yield spread premium paid by a lender, not simply the yield spread premium alone. *Id.* Total compensation to the broker must be reasonably related to the total value of goods or facilities provided or services performed; "simply delivering a loan with a higher interest rate is not a compensable service." *Id.* And payments must be commensurate with the amount normally charged for similar services in similar transactions in similar markets. *Id.*

Finally, by way of background, the district court in this case rejected *Culpepper*'s interpretation and granted *Chevron*-style deference to HUD's 1999 Policy Statement. The 2001 clarification was not issued until after briefing had begun on appeal. However, we have heard

from both parties on its impact and turn now to their arguments.

B

Schuetz urges us not to defer for a number of reasons. As she sees it, HUD's liability test permits what the statute prohibits by necessarily including the illegal referral fee in the "reasonableness of total compensation" analysis. In addition, the HUD test was adopted without "notice and comment" rulemaking, and a mere policy statement cannot have the same force and effect. Beyond this, in Schuetz's view, HUD rewrote § 8(c)(2) by eliminating the words "for" and "actually" ("for goods or facilities actually furnished or for services actually performed") in clarifying that total compensation should be "reasonably related to the goods, facilities or services furnished or performed." She posits that this also makes the 2001 Statement inconsistent with the regulations, the 1999 Statement, and with opinion letters sent by HUD's general counsel in 2000 to Congressman Bruce Vento and Senator Richard Shelby which indicated that the facilities or services must have been performed in exchange for compensation paid to the broker. Similarly, Schuetz submits, HUD's clarification is internally inconsistent in its application of § 8(c)(2)'s language in that for purposes of § 8(a) it adopts a "total compensation/reasonableness" test but requires a quid pro quo showing for purposes of § 8(b)'s prohibition on splitting fees. 2001 Policy Statement, 66 Fed. Reg. at 53054-55. Finally, she maintains that HUD lacked authority to correct the Eleventh Circuit's interpretation of a federal statute that is, in any event, not ambiguous.

We are not persuaded. First, *Chevron* deference is due even though HUD's Policy Statements are not the result of formal rulemaking or adjudication. "[T]he fact that the Agency previously reached its interpretation through means less formal than 'notice and comment' rulemaking does not automatically deprive that interpretation of the judicial deference otherwise its due." *Barnhart v. Walton*, 2002 WL 459209, at *7, ___ S. Ct.

___ (March 27, 2002); *United States v. Mead Corp.*, 121 S. Ct. 2164, 2173 (2001) ("[T]he want of that [notice-and-comment] procedure . . . does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded."). Here, RESPA authorizes HUD to interpret the statute, 12 U.S.C. § 2617(a), and HUD's regulations indicate that a "statement of policy" published in the Federal Register constitutes "a rule, regulation or interpretation" for purposes of RESPA. 24 C.F.R. § 3500.4(a)(1)(ii). Both policy statements are published in the Federal Register. Nothing suggests that the more formal process of notice and comment was short-circuited for any reason other than Congress's directive to issue the 1999 Statement of Policy within 90 days. Indeed, both policy statements comport with Congressional intent to provide a safe harbor for good faith compliance with HUD rules, regulations, and interpretations. 12 U.S.C. § 2617(a), (b). Schuetz relies on *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), in which an informal opinion letter failed to pass muster, but HUD's policy statements are different because Congress authorized the Department to interpret RESPA, HUD has responsibility for enforcing the statute, and it has expertise in the home mortgage lending industry. *See Barnhart*, 2002 WL 459209, at *7.

We must first determine whether the language of § 8(c)(2) "unambiguously forbids [HUD's] interpretation." *Barnhart*, 2002 WL 459209, at *4. It does not. Schuetz's argument is premised on the assumption that "payment for" can only be interpreted as protecting payments "*offered in exchange* for" services rendered. This language, however, is equally capable of supporting HUD's 2001 interpretation, which would read § 8(c)(2) as protecting payments "used as compensation for" services performed. Therefore, we turn to the question of "whether the interpretation for other reasons, exceeds the bounds of the permissible." *Id.* Whether or not HUD's interpretation is preferable, we cannot say that

it is impermissible. The Eighth Circuit has recently so held, and we agree with its reasoning. *Glover v. Standard Federal Bank*, No. 00-3611, 2002 WL 432992, ___ F.3d ___ (8th Cir. March 21, 2002).[6]

The HUD test focuses on whether compensable services of the sort identified in the 1999 Statement are provided, and if they are, then on whether the total compensation (without regard to whether it comes from the borrower, the lender, or both) is reasonably related to the services provided. This is consistent with the general intent of Congress in enacting RESPA, which is to foster home ownership. By allowing lenders to pay mortgage brokers yield spread premiums, prospective homeowners with a dearth of cash at the time of settlement can front less money and pay for some of their mortgage broker's services over time. Nor is HUD's test inconsistent with the prohibition on fees for referral; § 8 can reasonably be construed as only prohibiting payments that are for nothing else than the referral of business. HUD's test prevents this, too, for the first prong requires actual performance of compensable services. By the same token, the second prong requires that the total compensation, including the YSP if it is a component, be in the ball park. If it isn't, then regardless of

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[6] As the court explained:

> HUD's two-part test is fully consistent with RESPA. Reviewing services performed and their value on a case-by-case basis does not run afoul of the proscription stated in Section 8(a) prohibiting payments for referrals. Nor does it mean that you retroactively purify unlawful referral fees by offsetting their existence against the performance of legitimate settlement services. Indeed, the [plaintiffs'] course effectively writes Section 8(c) out of RESPA. As noted, Section 8(c) clearly anticipates payments to individuals for goods or facilities actually furnished or for services actually performed, and specifically excludes these payments from the Section 8(a) proscription. 12 U.S.C. § 2607(c)(2). Nothing in RESPA prohibits such payments in the mode of a YSP, or in any other particular form, and HUD's test simply helps determine whether the YSP, by its existence, use and amount, falls within or without the permissive boundaries of Section 8(c).

Glover, 2002 WL 432992, *9.

whether there is a YSP or the YSP is high or low, an illegal referral may be inferred.

Neither is the 2001 Statement inconsistent with HUD's prior communications. It carries forward the same principles articulated in the 1999 Statement, and we do not read the 2001 Statement as backing off the 1999 position that services must still actually have been performed for the compensation paid. Likewise, we do not see any conflict between the regulations and the Policy Statement. Schuetz contends that § 3500.14(e), which describes how an "agreement or understanding" for referral of business can be proved, adopts a different test for proving liability, but we do not agree. That section pertains to one element of § 8(a) but does not say anything about § 8(c)(2) or its intersection with § 8(a). Similarly, no fatal inconsistency exists on account of two informal letters that HUD's general counsel sent to members of Congress; regardless of how their language may be construed, they are not binding (nor may they be relied upon) in any event. *See* 24 C.F.R. § 3500.4(a)(1); *Smiley v. Citibank*, 517 U.S. 735, 743 (1996).

HUD's 2001 Statement of Policy is not internally inconsistent by virtue of how it treats the same language in § 8(c) for purposes of § 8(a) and (b). The Statement explains that § 8(b) prohibits any fee "in excess of the reasonable value of goods and services provided or the services actually performed." 66 Fed. Reg. at 53059. Regardless, to the extent that there is any difference in treatment, § 8(a) and (b) contain distinct prohibitions. Section 8(a) relates to referrals and § 8(b) to fee-splitting. Whereas a yield spread premium involves compensation from lender and borrower for loan origination, the charges that § 8(b) addresses involve a single payment split among settlement service providers.

Finally, HUD has not exceeded its area of expertise. Congress asked for its policy on the legality of yield spread premium payments. The 1999 Policy Statement and its clarification in 2001 respond to that query, concern administration of real estate settlement that is

clearly within HUD's province, and interpret a complex statute that HUD enforces.

For these reasons, we agree with the district court that deference is due the HUD policy statements.

C

Having resolved that the two-prong test contained in HUD's 2001 Statement of Policy provides the appropriate standard of liability for yield spread premiums under RESPA, we apply that test to Schuetz's case. With respect to the first prong, there is substantial evidence that Schuetz's mortgage broker provided her a host of compensable goods, facilities, and services. There is no evidence to the contrary. Under the second prong, the record demonstrates that Home Financial offered Schuetz the best interest rate it could based upon her situation, the rates available at the time, and its need to be compensated. It would not have originated her loan only for the direct fees that she personally paid up front. The evidence shows that the broker's total compensation, including direct as well as indirect fees, was consistent with local practice and reasonably related to the value that Home Financial contributed to Schuetz's transaction. Schuetz offered no evidence to the contrary, and none to show that her broker's services weren't worth what it was paid. In these circumstances, the district court correctly concluded that payment of the yield spread premium did not violate § 8.

III

It follows that the district court did not abuse its discretion in denying class certification. Yield spread premiums are not illegal per se, so whether they amount to a prohibited referral in any particular case depends upon the services provided by the broker and the total compensation paid for those services. This necessarily means that individual issues predominate, and that a class action is not superior.

AFFIRMED.

KLEINFELD, Circuit Judge, dissenting:

There's no avoiding a circuit split.[1] I agree with the Eleventh Circuit and respectfully dissent.

The problem with treating the "yield spread premium" as payment for services rendered to the borrower, to be evaluated for reasonableness in each individual case, is that the relationship between the amount of the premium and the value of the services is entirely fortuitous. Because the yield spread premium is calculated purely by the extent to which the borrower's interest rate is above par, sometimes it will be what the broker's services are worth, but only by chance. It's like a stopped clock that shows the right time twice a day, but the clock doesn't measure the time, and the yield spread premium doesn't measure the value of services. Indeed, the higher the interest rate the broker's client pays, the bigger the yield spread premium the broker gets. This makes the premium tend to be inversely proportional to the value of the services to the borrower. Whether the amount approximates the value of services for Schuetz or not, she should have been allowed to go forward with her class action, because it is precisely the fortuitousness that makes the yield spread premium violate RESPA.

RESPA prohibits "kickbacks" by lenders to mortgage brokers. I see the phrase "yield spread premium" as an obfuscatory way of avoiding calling a kickback a kickback. A kickback is "a usually secret rebate of part of a purchase price . . . to the one who directed or influenced the purchaser to buy from such seller."[2] It is a payment by a third party to an agent to act on behalf of the third party rather than the principal.[3] The home buyer hires a mortgage broker to shop for a good loan for her, but

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[1] *Compare Glover v. Standard Federal Bank*, 283 F.3d 953 (8th Cir. 2002) with *Culpepper v. Irwin Mortgage Corp.(Culpepper III)*, 253 F.3d 1324 (11th Cir. 2001).

[2] Webster's Third New International Dictionary (1981).

[3] Restatement (Second) of Agency § 391 (1984).

the broker takes $500 from a lender to steer the buyer to the lender, if the buyer can be persuaded to sign a loan with interest above par. This is how the "yield spread premium" is calculated. The measure has nothing to do with how much work the broker does. Instead, it is based on one thing: how far above par the interest rate is.

Conceivably, the yield spread premium could be good policy to promote home ownership, as HUD[4] and the majority suggest.[5] The theory would be that some home buyers might not be able to get their loans if they have to pay the broker's reasonable fee up front for doing all the work of putting them together with a lender, and the "yield spread premium" lets them roll the fee into the financing and pay it over the term of their mortgage, perhaps twenty or thirty years. But Congress is no more bound by the "law and economics" school than by "Mr. Herbert Spencer's Social Statics."[6]

There are several problems with vindicating the yield spread premium on this theory that the yield spread premium is a means of, in practical economic effect, financing closing costs. One is that Congress didn't enact it. It prohibited kickbacks whether they work out as good economics or not.[7] The second is that the record doesn't support it. No evidence has been shown to us that the yield spread premium offsets foregone closing costs. Schuetz was charged closing costs anyway, and it was not demonstrated that they should have been higher to compensate the broker, or that the yield spread

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[4] *See* Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees under Section 8(b), 66 Fed. Reg. 53052 (Oct. 18, 2001).

[5] *See* Majority at 8355 [App., *supra*, 15a].

[6] *See Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

[7] 12 U.S.C. § 2607(a) ("[n]o person shall give and no person shall accept any . . . kickback").

premium capitalized the value of any inadequacy of the closing costs she paid compared to the value of the broker's services.

Third, Congress may have been right to reject kickbacks as a matter of economics. The yield spread premium doesn't necessarily roll over the amount of the broker's reasonable fee into the loan and capitalize that portion of the fee as the yield spread premium fee paid by the lender to the broker. The HUD test merely requires that the resulting closing costs be "reasonably related to the value of the goods or facilities that were actually furnished or services that were actually performed,"[8] but this does not require that the yield spread premium be subtracted from the closing costs, so the borrower may not actually benefit from the increase in her interest rate. Few but the most alert and aggressive borrowers are likely to spot the obscure "yield spread premium" charge on their closing statement, obtain and comprehend an accurate and coherent explanation from the broker's employee of what it means, and leave in a huff if they don't want to pay the extra interest. Both its obscurity of meaning and its relative size, perhaps a few hundred dollars, of closing costs in the thousands, on a five or six figure loan, may give Congress a reason to protect buyers from it.

It is tempting to defer to HUD anyway because of its expertise, but I do not think we can properly defer to HUD's interpretation. First, the yield spread premium is a kickback, and kickbacks are expressly prohibited by the statute, which says that "[n]o person shall give and no person shall accept any . . . kickback."[9] That express language cannot be interpreted away. RESPA does create several exceptions to its expansive reach, including the most arguably applicable: an exception for

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[8] Real Estate Settlement Procedures Act Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, 64 Fed. Reg. 10080, 10084 (March 1, 1999).

[9] 12 U.S.C. § 2607(a).

"(1) the payment of a fee . . . (C) by a lender to its duly appointed agent for services actually performed in the making of a loan."[10] As discussed above, the yield spread premium has no relation to the services actually performed by the mortgage broker. The yield spread premium is not within RESPA's explicit exceptions.

Congress did give the HUD Secretary the power to exempt:

> such other payments or classes of payments or other transfers as are specified in regulations prescribed by the Secretary, after consultation with the Attorney General, the Secretary of Veterans Affairs, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Secretary of Agriculture.[11]

Thus, when a conference committee[12] told HUD to decide whether yield spread premiums were consistent with RESPA, HUD should have followed the procedure prescribed by the statute. It did not. The interpretations it promulgated were not regulations. Moreover, the Secretary did not consult with the other executive offices, such as the Secretary of Veterans Affairs, with whom the statute required consultation. HUD did not properly exempt yield spread premiums under RESPA.

RESPA also creates a safe harbor. It states that

> (a) The Secretary is authorized to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes

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[10] 12 U.S.C. § 2607(c).

[11] *Id.*

[12] *See* Conference Report on the Departments of Veterans Affairs and Housing and Urban Development, and Independent Appropriations Act, 1999, H.R. Conf. Rep. No. 105-769, 105th Cong., 2d Sess. 260 (1998). Where the Majority Opinion says "Congress" told HUD to do this, it refers to this conference committee report, not an act of Congress. *See* Majority at 8348-8349 [App., *supra*, 9a].

> of transactions, as may be necessary to achieve the purposes of this Act.
>
> (b) No provision of this Act . . . shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Secretary or the Attorney General . . . .[13]

Where a defendant relied on HUD's rule, regulation, or interpretation of RESPA, he or she would not be liable. There is no rule or regulation at issue here. Assuming HUD's 1999 and 2001 interpretations could provide safe harbors for subsequent yield spread premium charges, they could not here, because Schuetz closed on her mortgage and Banc One received its kickback in 1997. Because Banc One could not have relied on the then-nonexistent interpretations, it cannot claim a safe harbor under the statute.

The majority relies on *Barnhart v. Walton*[14] and *United States v. Mead Corp.*[15] for the proposition that "the fact that the Agency previously reached its interpretation through means less formal than 'notice and comment' rulemaking does not automatically deprive that interpretation of the judicial deference otherwise its due."[16] However, where the statute is unambiguous, and the intent of Congress is clear, as it is here – "[n]o person shall give and no person shall accept any . . . kickback"[17] – there is no occasion for *Chevron* deference,[18] and we need not reach the question of whether HUD's policy statements are formal enough to merit *Chevron* deference in the absence of notice and comment rulemaking.

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[13] 12 U.S.C. § 2617.

[14] 122 S. Ct. 1265 (2002).

[15] 121 S. Ct. 2164, 2173 (2001).

[16] *Barnhart*, 122 S. Ct. at 1271.

[17] 12 U.S.C. § 2607(a).

[18] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also Barnhart*, 122 S. Ct. at 1269.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 97-2195-PHX-RCB

CAROLINE RICHTER,
AND ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

BANC ONE MORTGAGE CORP., AND
PORTFOLIO MORTGAGE CO., INC.,
Defendants.

No. CIV 98-284-PHX-RCB

BETTINA J. SCHUETZ,
AND ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

BANC ONE MORTGAGE CORP., AND
HOME MORTGAGE CORP., A/K/A HOME MORTGAGE
FINANCIAL CORP.,
Defendants.

[September 20, 2000]

ORDER

Cross-motions for summary judgment are pending before the court. Oral argument was heard on August 7, 2000. Having carefully considered the matter, the court now rules.

BACKGROUND

Plaintiff Schuetz challenges various practices employed by Banc One in conducting its home mortgage finance business. Schuetz agreed to purchase a home in the Sun Lakes Country Club development in May, 1997. She sought the services of a mortgage broker, Home Mortgage Financial Corp., to facilitate the purchase by finding her a mortgage. Schuetz expected her mortgage broker to offer the best interest rate available. Specifically, Schuetz claims that in negotiating her loan, "I told [the broker] that I wanted the best rate that he could give me and that I wasn't willing to pay points." Maclin Aff. (doc. #37), Ex. Z (Schuetz depo.) at 51.[1] She obtained a 30-year loan in the principal amount of $68,800 with a 7.5% interest rate from Banc One. Her loan closed in August 1997.

This suit centers on the appropriateness of a $516.00 "yield spread premium" payment paid by Banc One to Home Mortgage Financial Corp. A yield spread premium is a lump sum paid by a lender to a broker at the time a mortgage closes, when the loan originated by the broker bears an above-par interest rate. Yield spread premiums are widely used in the industry, but they are subject to characterization by some as referral fees, causing friction with the federal mortgage lending regulatory scheme. The ensuing uncertainty has prompted attempts by the Department of Housing and Urban Development (HUD) to fashion better rules, including a safe harbor provision for lenders, but these efforts have not yet resulted in the promulgation of new rules.

With Richter, the plaintiff in an action consolidated with this one, Schuetz sought class certification, but the court rejected her request on the grounds that the rea-

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[1] Plaintiff's documentation of her summary judgment motion is somewhat difficult to follow. The statement of facts, while citing deposition testimony and other evidence, is not supplemented with exhibits containing the cited testimony. Nor do the references to the depositions indicate where in the record this evidence is to be found. However, the court has little doubt as to Plaintiff's evidentiary position.

sonableness of broker fees in any particular loan transaction requires individualized evaluation. *See* Order of March 19, 1999 (doc. #48). The Court of Appeals denied permission for an interlocutory appeal of that order. Ninth Circuit Order of June 18, 1999 (doc. #56). Richter and Banc One reached an oral agreement to settle this matter on April 28, 2000, and they have filed a stipulation for dismissal (doc. #91). Accordingly, Richter does not participate in the present motions. The dispute between the parties was further simplified when Schuetz's mortgage broker, originally named as a defendant, was dismissed pursuant to stipulation. *See* Order of May 25, 2000 (doc. #81). At this point, Schuetz and Banc One each move for summary judgment on the question of Banc One's liability under the Real Estate Settlement Procedures Act (12 U.S.C. § 2601 *et seq.*) (RESPA). Banc One further argues that it is entitled to summary judgment on Schuetz's other claims. Disposition of the competing motions hinges on deciding which party bears the burden of establishing the reasonableness (or unreasonableness) of the charges Schuetz paid, and whether either party has satisfied that burden for summary judgment purposes.

A. *Introduction to home mortgage lending*

Home mortgage loans, as financed by Banc One, involves four groups of actors: the consumer who borrows money to buy a house; the lender, here Banc One; the mortgage broker, an intermediary who brings borrower and lender together, 24 C.F.R. § 3500.2(b); and the institutional investor who conceives of the mortgage loan as a right to receive a stream of payments over time – or in other words, as an asset.

A consumer approaches the mortgage process with a variety of "needs," Def. SOF (doc. #73), Ex. A (Johnson-Blackburn Decl.) ¶ 5, reflecting the consumer's credit rating, income, sensitivity to interest rate variations, preference for paying charges up front or as a higher

interest rate, the size of down-payment she is able to make, and the house she desires to buy.

A mortgage broker sounds out the consumer's needs and provides various loan origination services. Value-adding services that a broker may perform in the mortgage origination process include:

(a) Taking information from the borrower and filling out the loan application;

(b) Analyzing the prospective borrower's income and debt and pre-qualifying the prospective borrower to determine the maximum mortgage that the prospective borrower can afford;

(c) Educating the prospective borrower in the home buying and financing process, advising the borrower about the different types of loan products available, and demonstrating how closing costs and monthly payments could vary under each product;

(d) Collecting financial information (tax returns, bank statements) and other related documents that are part of the application process;

(e) Initiating/ordering verifications of employment and verifications of deposit;

(f) Initiating/ordering requests for mortgage and other loan verifications;

(g) Initiating/ordering appraisals;

(h) Initiating/ordering inspections or engineering reports;

(i) Providing disclosures (truth in lending, good faith estimates, etc.) to the borrower;

(j) Assisting the borrower in understanding and clearing credit problems;

(k) Maintaining regular contact with the borrower, realtors, and lender, during the period between application and closing and gathering any additional needed information;

(l) Ordering legal documents;

(m) Determining whether the property is located in a flood zone;

(n) Participating in the loan closing.

See Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, 64 Fed. Reg. 10080, 10085 (1999) [hereinafter *Statement of Policy*].[2] Banc One adds that it compensates brokers for the cost of maintaining physical facilities for the retail sale and distribution of loans. Johnson-Blackburn Decl. ¶ 4.

A broker selects a loan product from among the various loans offered by the lending institutions with which it maintains a relationship. A loan product is characterized by whether federal insurance or guaranty protections apply, whether the rate is fixed or variable, and its term. Def. SOF (doc. #73), Ex. B (Smith Decl.) ¶ 3. According to Banc One, a broker selects a loan based on its price, the borrower's requirements, and its provision of "reasonable compensation to the broker." *Id.* ¶ 7. According to Schuetz's broker, loans are selected based on "the lender's service, turnaround time, ability to make the required funds available, reputation in the community, level of professionalism, reputation with the banking department, competitive rates, underwriting flexibility, and the availability of products from that lender." Def. SOF (doc. #73), Ex. D (Lacy Decl.) ¶ 8.[3]

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[2] A "statement of policy" is an official agency interpretation, authorized by Congress and intended as a guideline for compliance with RESPA. 12 U.S.C.A. § 2617(a); 24 C.F.R. § 3500.4(a).

[3] HUD has recognized a distinction among mortgage brokers based on the nature of the service they provide. Some mortgage brokers hold themselves out to consumers as guides through the financing process, adding value by looking out for the consumers' interest. Others do not purport to represent the borrower but simply offer to "make loans available to consumers from any number of funding sources with which the mortgage broker has a business relationship." Policy Statement, *supra* at 10081. The brokers have been dismissed from this case, so the

B. *Broker Compensation*

In the mortgage finance industry, brokers are compensated in a variety of ways. Policy Statement, *supra* at 10081. Compensation from the borrower to the broker is called a direct fee, whereas money that the borrower pays the lender and the lender pays the broker is called an indirect fee. Banc One offers intermediaries options in structuring their compensation and allows the broker arranging the loan to choose. *See* Johnson-Blackburn Decl. ¶ 6. Brokers select from an array of loans with various characteristics and corresponding prices that Banc One will pay to fund such loans. Smith Decl. ¶ 7. The loan type and the price paid by Banc One help determine how much the broker stands to make on a loan origination. Brokers decide their compensation for any particular transaction by choosing the combinations of loan characteristics and prices to offer a consumer. As Mic Laasch, the broker working with Schuetz stated, in the course of negotiations he informs borrowers of

> the trade-off between closing costs and interest rates; if the borrow wants to reduce interest rate, the closing costs will increase, and vice versa. If the borrower wants to keep closing costs at a minimum, and the fees charged to the borrower are insufficient to compensate me for my work, I cannot offer the wholesale lender's par rate to that borrower. Conversely, if the borrower wants to pay additional discount points to "buy down" the interest rate, I may be able to offer a rate below the wholesale lender's par rate.

Def. Supp. SOF (doc. #83), Ex. B (Laasch Aff.) ¶ 8.

Banc One creates a new array of loans and prices daily and delivers rate sheets with this information to brokers. Smith Decl. ¶ 6. As a wholesale lender, Banc One establishes its prices for loan products by looking to the

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distinction is relevant only to the extent that the reasonable value of the two kinds of brokers' services is different.

secondary market where it intends to resell loans. For each loan product, Banc One creates a baseline model with certain assumed characteristics. It estimates the secondary market value of the model loan and, taking its own costs and return requirements into account, derives a "par" price which it uses in developing its rate sheets for brokers. *Id.* ¶ 3. To the extent an actual loan departs from the assumptions of the model, Banc One's price to brokers varies. *Id.* ¶ 4. For example, if the interest rate on a loan presented by a broker exceeds the rate assumed by Banc One's par price model, Banc One will pay the broker a "yield spread premium" equal to the value of the additional interest. *Id.* ¶ 5. As a result, only the broker realizes a benefit from the higher rake the borrower agrees to pay. *Id.*

Banc One contends here that the yield spread premium is compensation reasonably related to the loan origination service performed by the broker. Banc One concedes, however, that its pricing array allows a broker to choose the loan option that compensates him or her at a level that Banc One does not review. Johnson-Blackburn Decl. ¶ 6. Banc One suggests that the broker and borrower agree on a compensation method and amount, *see id.*, but it has no mechanism in place to ensure that brokers present borrowers with a variety of compensation arrangements. Schuetz's broker suggests that in the course of working up a loan application, a broker gains sufficient understanding of a borrower's financial situation to decide what compensation methods are agreeable to the borrower:

> For example, a borrower who intends to occupy a property for a longer period of time may prefer to pay discount points to "buy down" the interest rate. In contrast, a borrower who expects to sell the property within a short period of time may prefer to pay a higher interest rate in order to avoid paying some discount points and/or some closing costs. Similarly, a borrower who simply does not have much cash up front would likely want to obtain a loan with no

> or low up-front closing costs. "No points/low closing costs" loans, in which all or a substantial portion of [the broker's] fees is funded by a "yield spread premium" or other fee, are popular with borrowers because the loans require minimal out-of-pocket expenditures and the closing costs are financed over the life of the loan through a slightly higher interest rate.

Adams Aff. (doc. #36) ¶ 8. Thus, brokers may believe that presenting choices to a borrower is unnecessary in light of the borrower's expressed preferences. Setting to one side the brokers' reasons for electing one compensation formula over another, the fact remains that by adjusting the characteristics of the loan offered to a consumer, a broker who sends loans to Banc One for financing can effectively command his or her fee without input from Banc One. This is true whether the broker is compensated with direct fees only or with a combination of direct fees and a yield spread premium. As the broker who provided loan origination services to Schuetz declares: "the interest rate offered to Ms. Schuetz was the best rate I could offer her at the time, based upon her situation, her preferences, the rates available in the marketplace at that time, and *our need to be compensated for our services*." *Id.* ¶ 7 (emphasis added). Market pressures constrain a broker's ability to demand high fees, *see* Godwin Decl. (doc. #34) ¶ 14, but the effectiveness of this check depends on the borrower's independent knowledge of prevailing rates and loan practices.

C. *Plaintiff's Mortgage*

Schuetz's loan involved a combination of both direct and indirect fees. *See* 3rd Robinovitch Aff. (doc. #69), Ex. F (settlement statement). She paid direct fees of $688.00 for loan origination, $688.00 for loan discount, and $285.00 for processing. The indirect fee, or "mort-

gage broker fee," was $516.00.[4] The total brokerage fee was $2,177.00. Schuetz does not contest the reasonableness of the direct fees or the total of the direct fees and the indirect fees. In her motion for summary judgment, she argues that the "amounts paid are immaterial – the determinative issue is the nature and character of the disputed payments, and the consideration given for them." Pl. Motion (doc. #71) at 2. In the event that the amount paid does matter, she argues that the direct fees fully compensated her broker for services provided. *See id.* at 6. In her view, the indirect fee constitutes a "premium" not connected to any service. Instead, she sees the indirect fee functioning as a bonus to brokers for referring loans to Banc One, particularly loans on favorable terms.

She further contends that Banc One improperly induces brokers to put together loan applications based on a higher interest rate by paying the brokers more for such loans. *See id.* at 4. In making this point, she emphasizes that Banc One considers loans assets, the value of which is determined only by the financial attributes or terms of the loan.[5] When the price paid to brokers depends only on the proposed mortgage contract, in Plaintiff's view it follows that Banc One pays the broker for the loan without reference to any services that the broker provided to the borrower. *See id.* at 10-11 (discussing "Single Family Purchase Agreement" contract obtaining between Banc One and brokers).

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[4] Banc One acknowledges that its "mortgage broker fee" is known also as a "yield spread premium." *See* Johnson-Blackburn ¶ 8.

[5] To Banc One, there are two valuable elements to a mortgage loan: the right to receive monthly payments, and the right to service the loan. *See* Douglas Decl. (doc. #35) ¶ 31. Even when the right to receive payments has been assigned to an institutional investor, Banc One may retain the job of servicing the loan, which involves collecting payments and allocating them between interest and principal, among other things. *See id.* The investor pays Banc One for servicing the loan at a rate that depends on a number of factors, including the loan amount. *See id.* ¶ 32.

In response, Banc One argues that the reasonableness of the fees charged is the key to the case, and that the total fees Schuetz paid were reasonable "in light of the effort required to bring the loan to closing." Def. Opp. (doc. #82) at 6. Indeed, it argues that the direct fees Schuetz paid were insufficient to compensate the brokerage. *See id.* at 7. Only the indirect payment from Banc One enabled the broker to put together the transaction, it claims. It points out that Schuetz's brokerage dealt exclusively with lenders that offered yield spread premiums, so in financing any particular loan, the broker was not induced to deal with Banc One over other lenders it worked with.

In reply, Schuetz reiterates earlier arquments. (doc. #88).

On its motion for summary judgment on Plaintiff's RESPA claims, Banc One argues that Schuetz's broker provided a variety of services and a retail facility that legitimately warrant compensation. Next, it argues that the amount Schuetz paid her broker was reasonable. It argues that Banc One intended the yield spread premium to compensate the broker for the services it rendered. Finally, Banc One asks for summary judgment on all non-RESPA claims, on the grounds that these causes of action depend on a RESPA violation.

In response, Schuetz argues that Banc One did not form any intention to compensate her broker for services, because "it never looks at any services provided by a broker, never evaluates a broker's fees before paying the premium to ensure the fees are proper, and never cares if borrowers are aware their rate has been inflated above par, and that the extra interest is funding the premium to the broker." Pl. Opp. (doc. #84) at 3. Notwithstanding her acknowledgment, prior to closing, that her lender might make a payment to her broker, Schuetz now argues that the yield spread premium is duplicative of the direct fees and not reasonable because she never agreed to pay a "yield spread premium." She takes the position that yield spread premiums fall under

the statutory definition of a "kickback." Attempting to refute Banc One's statement about its intentions in paying a yield spread premium, she argues that RESPA does not require that a payment from a lender affirmatively influence a broker's decision to submit a loan to be an illegal kickback. *See id.* at 18. She also conceives of her state law deceptive practices and federal RICO claims as independent of RESPA.

In reply, Banc One contends that Schuetz's attack on the yield spread premium is too broad and would render such payments invalid as a matter of course. Def. Reply (doc. #87) at 1. RESPA, it argues, does not require a lender to match specific services to the broker's fee, as long as the total fee corresponds to the total value provided by the broker. Pointing out that Schuetz does not challenge the $2,177 total broker fee on her $68,000 loan as excessive, Banc One contends that Schuetz has not raised a dispute about its reasonableness. In addition to disputing the applicability of RICO to alleged RESPA violations, it maintains its position that Schuetz is not entitled to relief under Arizona law.

DISCUSSION

In determining whether to grant summary judgment, the court will view the facts and inferences from these facts in the light most favorable to the nonmoving party. *Matsushita Elec. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 577 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A material fact is any factual dispute that might affect the outcome of the case under the governing substantive law. *Id.* at 248. A party opposing a motion for summary judgment cannot rest upon mere allegations or denials in the pleadings or papers, but instead must set forth specific facts demonstrating a genuine issue for trial. *See id.* at 250. Finally, if the nonmoving party's evidence is merely colorable or is not

significantly probative, a court may grant summary judgment. *See, e.g., California Architectural Build. Prods., Inc. v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988). On cross-motions for summary judgment, each movant has the burden of producing evidence in support of its motion that would allow the court to direct a verdict in its favor. *See High Tech Gays v. Defense Industry Security Clearance Office*, 895 F.2d 863, 874 (9th Cir. 1990).

A. *RESPA claims*

1. Statutory and regulatory framework

RESPA is a sunshine statute. It increases the supply of information to borrowers to enable informed decision-making about the total cost of loans – including settlement costs – before entering them. *See* Policy Statement, *supra* at 10082 (discussing legislative history). Lenders must provide borrowers with a statement clearly specifying all settlement charges on a standard form developed by HUD. 12 U.S.C.A. § 2603 (West 1989 & Supp. 1999). Lenders must also supply borrowers with an information booklet prepared by HUD to instruct borrowers how mortgage transactions work and how to recognize unreasonable charges. *See id.* § 2604. RESPA also prohibits abusive forms of dealing among lenders and intermediaries that lead to "unnecessarily high settlement charges" for consumers. *Id.* § 2607(a). Lenders may not reward intermediaries with kickbacks or referral fees, but they may provide compensation for "goods or facilities actually furnished or services actually performed." 12 U.S.C. § 2607(c)(2); 24 C.F.R. § 3500.14.

Figuring out whether a broker has earned fees paid by the lender has proved challenging, but it is essential in order to distinguish legitimate compensation from unlawful kickbacks. In Regulation X, 24 C.F.R. § 3500.1 *et seq.*, HUD implements RESPA and clarifies its broader terms. A referral is defined as any inducement having "the effect of affirmatively influencing the selection by

any person of a provider of a . . . business incident to or part of a settlement service when such person will pay for such settlement service or business incident thereto . . . ." 24 C.F.R. § 3500.14(f)(1). The prohibition on kickbacks provides that "No person shall give and no person shall accept any portion, split or percentage of any charge made or received for the rendering of a settlement service . . . other than for services actually performed." *Id.* § 3500.14(c). Permissible compensation includes: "a payment by a lender to its duly appointed agent or contractor for services actually performed in the origination, processing, or funding of a loan"; and "a payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed." *Id.* § 3500.14(g)(1)(iii)-(iv). Impermissible payments are recognized by this criterion: "If the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods actually performed or provided." *Id.* § 3500.14(g)(2). In the context of prohibited referral fees, "when a person in a position to refer settlement service business . . . receives a payment for providing additional settlement services as part of a real estate transaction, such payment must be for services that are actual, necessary and distinct from the primary services provided by such person." *Id.* § 3500.14(g)(3).

2. Judicial and administrative interpretations

When the court ruled on Plaintiff's request for class certification in March 1999, the most recent authority interpreting the law on referral fees was an opinion by the Eleventh Circuit, *Culpepper v. Inland Mortgage Corp.*, 132 F.3d 692 (11th Cir.), *as modified*, 144 F.3d 717 (11th Cir. 1998). Contemporaneous with this court's ruling in March 1999, HUD issued its Policy Statement. The parties disagree on whether *Culpepper* or the Policy Statement should supply the analytical rules to determine the legality of Banc One's payment to Schuetz's broker. *Compare* Pl. Motion (doc. #71) at 12

("the correct test to determine a violation under § 8 of RESPA is set forth in *Culpepper*) *with* Def. Motion (doc. #72) at 7 ("HUD adopted a two-pronged analysis for determining if such payments violate Section 8(c) or RESPA"). The test applied strongly determines the outcome of the case. *See Schmitz v. Aegis Mortgage Corp.*, 48 F.Supp.2d 877, 881 (D.Minn. 1999) (comparing *Culpepper*'s "stringent evidentiary burden on the RESPA defendant" with HUD's "functional" approach); *compare Brancheau I*, 182 F.R.D. 579 (D.Minn. 1998) (applying *Culpepper* to certify a class) *with Brancheau II*, 187 F.R.D. 591, 593-94 (D.Minn. 1999) (on issuance of HUD Policy Statement, reconsidering, denying certification and granting summary judgment to lenders).

In *Culpepper*, the Eleventh Circuit determined that yield spread premiums can be referral fees. *Culpepper I*, 132 F.3d at 696. To be legal, a yield spread premium must be (1) for a good or service, and (2), if it was for a good or service, the payment may not be inflated beyond the value of the service so as to reflect a referral fee. *See id.* at 696-97. The lenders in that case failed to establish that the yield spread premium was a legitimate payment for services to the borrowers, because the borrowers had paid a separate origination fee that fully compensated the broker, or for services to the lender, because the payment was "not tied to the quantity or quality of services that [the broker] provided." *Id.* at 697; *see also Culpepper II*, 144 F.3d at 718 (calling outcome of *Culpepper I* "highly depending upon the facts"). Under *Culpepper I*, the reasonableness of a yield spread premium becomes relevant only once the court determines that the mortgage lender paid the premium to compensate the broker for services performed. Unless the payment can be correlated or "tied" to some valuable service, it is an invalid referral fee under RESPA, regardless whether the total compensation to the broker was reasonable. *See id.*

HUD takes the position that the yield spread premium compensation method is not illegal *per se*. Policy

Statement, *supra* at 10084. Determining whether a particular yield spread payment violates RESPA involves a two-part test: (1) "whether goods or facilities were actually furnished or services were actually performed for the compensation paid"; and (2) "whether the payments are reasonably related to the value of the goods or facilities that were actually furnished or services that were actually performed." *Id.* The services performed must be of a compensable character. *Id.* at 10082. Payments are reasonable if, when indirect and direct fees are added together, the total broker compensation is in line with the fees commanded in similar transactions and in similar markets. *See id.*

In some circumstances, a particular item of the broker's compensation may be anomalous; this may be evidence of an unearned fee. *See id.* at 10086. Or, if a lender payment duplicates direct compensation paid by the borrower for actual services, this duplication will show up as a suspiciously high total fee. *See id.* At bottom, HUD recognizes that the borrower is purchasing a loan with all the attendant necessary services, and in view of this economic reality, it is unnecessary to allocate the total fee neatly among various services. *See id.* As long as the total broker compensation is reasonable, however composed of indirect and direct fees it is legal under RESPA. *See id.* (as an example, where borrower pays $500 direct fees to broker and lender pays $600 indirect fee, reasonableness inquiry assesses $1,100 total compensation).

Many courts have decided that the Policy Statement does not force a change in the *Culpepper* analysis of the legality of yield spread premiums. *See Culpepper v. Inland Mortgage Corp.*, 1999 WL 113527 *4 (N.D.Ala. 1999); *Heimmerman v. First Union*, 188 F.R.D. 403, 406 (N.D.Ala. 1999); *Briggs v. Countrywide Funding Corp.*, 188 F.R.D. 645, 649 n.5 (M.D. Ala. 1999); *Glover v. Standard Federal Bank, et al.*, No. 97-2068 (DWF/AJB)

(D.Minn. March 22, 2000)[6]; *Wilson v. Commercial Federal Mortgage Corp.*, No. 98-J-084, slip op. at 10-11 (N.D.Ala. March 22, 2000). Some courts have found the HUD Policy Statement departs so far from the statutory intent that they reject it as irrational in favor of the *Culpepper* rules. *See Glover v. Standard Federal Bank, et al.*, No. 97-2068 (DWF/AJB) (D.Minn. March 22, 2000) (alternate holding); *see also Heimmerman*, 188 F.R.D.at 406 (rejecting defendant's interpretation of Policy Statement as "logically inconsistent" with statute).

Yet others have concluded that the HUD Policy Statement supersedes the Eleventh Circuit's interpretation. *See In re Old Kent Mortgage Co. Yield Spread Premium Litig.*, 191 F.R.D. 155, 161 (D.Minn. 2000); *Levine v. North American Mortgage*, 188 F.R.D. 320, 328 (D. Minn. 1999) ("*Levine I*"); *Schmitz v. Aegis Mortgage Corp.*, 48 F.Supp.2d at 880 n.3 (D.Minn. 1999); *Lee v. N.F. Investments, Inc.*, No. 99-CV-426 (ERW) (E.D. Mo. March 15, 2000); *Yasgur v. Aegis Mortgage Corp.*, No. 98-CV-121 (JMR) (D. Minn. February 17, 2000); *Golon v. Ohio Savings Bank*, 1999 WL 965593 *5 (E.D. Ill. October 14, 1999); *Potchkin v. The Prudential Home Mortgage Co.*, No. 97-CV-525 (CBA), slip op. at 18 (E.D.N.Y. Nov. 12, 1999).

Culpepper requires that payments correlate to specific and identified services; HUD requires that the total payment be reasonable for the total services. The difference between the two standards is whether reasonableness can be reached without first allocating the payment among the services performed. To support her argument that fees must be attributable to specific services, Schuetz argues that the HUD policy statement can be read as consistent with *Culpepper*. *See* Motion (doc.

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[6] The unpublished orders cited herein were submitted as exhibits by the parties.

#71) at 13, n.3.[7] To support her position, she does not attempt to reconcile the two sets of rules but draws this conclusion from a statement by a HUD official. In a letter of December 17, 1999, HUD's General Counsel, Gail W. Laster, explained to United States Representative Bruce Vento that "HUD did not intend for the Policy Statement to create a new legal standard or to change existing law." 3rd Robinovitch Aff. (doc. #69), Ex. E. On this basis, Schuetz would preclude an interpretation of the Policy Statement that departs from the *Culpepper* rules.

A substantially similar argument was made before the District of Hawaii and rejected. *See Isara v. Community Lending, Inc.*, No. 99-CV-310 (SPK) (January 20, 2000). As Judge King wrote, not only does the General Counsel letter not "carry the weight Plaintiff impresses upon it," but to assuage that the Policy Statement reinforces *Culpepper* begs the question whether *Culpepper* correctly articulated "existing law." *Id.* at 10. The court finds Judge King's assessment generally persuasive. When issuing its March 17, 1999 order, however, this court relied on *Culpepper* as controlling on the belief that *Culpepper* constituted the "existing law." Questioning the original accuracy of *Culpepper*'s rendering of RESPA is not necessary to dispose of Schuetz's argument that the Policy Statement does not change the law.

Following the letter to Representative Vento, HUD's General Counsel explained that while the Policy Statement did not "change" existing law, it "articulates" a two-part test for determining the legality of yield spread premiums. 3rd Robinovitch Aff. (doc. #69), Ex. F (letter of March 21, 2000 to Senator Richard Shelby). "[I]ndeed, in elucidating the tests for when fees could be legal, [HUD] sought to establish a brighter line for when fees could be legal." *Id.* For HUD to contend that its

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[7] If this were truly the case and the two authorities coincided perfectly, then Schuetz's insistence that *Culpepper* should guide this court's analysis instead of the Policy Statement would be hard to fathom.

new "articulation" of the regulatory requirements does not "change" existing law is slightly disingenuous, for by announcing what RESPA does require, HUD eliminates other interpretations that were hitherto viable, including the Eleventh Circuit's version in *Culpepper*. At the same time, the Policy Statement provokes questions about its own proper interpretation. *See, e.g., Glover*, slip op. at 9 ("[T]he HUD Policy Statement is open to interpretations different from that advanced by the other courts of this District."). Every interpretation contributes some burden of additional meaning that the original did not express; if the entire import of the original were transparent, "elucidation" would be superfluous. Ultimately, whether the Policy Statement should be viewed as "new law" or not is a profitless discussion, for courts give agency interpretations "powerful effect." I Kenneth Culp Davis & Richard J. Pierce, Jr. *Administrative Law Treatise* § 6.10 at 282 (3rd ed. 1994). Thus, the courts that recognize the Policy Statement as superseding authority have the better view, despite HUD's reticence about its impact.

An administrative agency's interpretation of a statute is presumptively authoritative when Congress delegated interpretation and enforcement to the agency. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S. Ct. 2441 (1978). In particular, an agency's construction of its own regulations deserves respect unless proven "demonstrably irrational." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565, 100 S.Ct. 790, 797 (1980) (preferring agency's construction of consumer protection statute in debtor-creditor context). Congress authorized HUD to promulgate rules and regulations to implement RESPA and to interpret the statute. 12 U.S.C. § 2617(a). Therefore, HUD's Policy Statement guides the outcome here absent a compelling showing that it makes no sense.

The court is convinced that the statute does not require broker compensation to be justified item by item. RESPA aims to protect home buyers "from unnecessarily

high settlement charges." Congress traced the gouging to "kickbacks and referral fees" that added expense without value. In the Policy Statement, HUD has focused on protecting consumers from inexplicably costly settlements, rather than attempting to police the increasingly complex relationships among financial intermediaries and lenders. "[I]t is not necessary or even feasible to identify or allocate which facilities, goods or services are performed or provided for the lender, for the consumer, or as a function of State or Federal law." Policy Statement, *supra* at 10086. As long as the consumer is not fleeced by an above-market charge for the package of services loan origination represents, the method by which the broker collects his or her total fee does not harm the consumer.

One court finding the Policy Statement irrational was concerned that untying fees from specific services would permit a practice of unlawful referral fees. "[A] lender could offer a broker an explicit kickback, but then justify that kickback post hoc by tying the 'total compensation' to goods and services." *Glover*, slip op. at 10; *see also Dujanovic v. MortgageAmerica, Inc.*, 185 F.R.D. 660, 673 (N.D.Ala. 1999) ("the central issue is how and why the defendant paid the yield spread premiums, not whether, in hindsight, sufficient services or goods were provided that would justify the price."). This concern focuses on the technical definition of "kickback" while divorcing it from the concern about "unnecessarily high" settlement fees. In this court's view, as long as the borrower pays a fair price for brokerage services and no more, it is unclear why payments from a lender should be viewed more suspiciously than the broker's direct charges.

Schuetz misunderstands the role of the market price in the HUD's test. In support of an analysis that allocates each portion of a fee to a particular service, she quotes the Policy Statement: "Moreover, HUD also believes that the market price used to determine whether a particular price meets the reasonableness test may not

include a referral fee or unearned fee, because such fees are prohibited by RESPA." Policy Statement, *supra* at 10086. This proposition does not require that "before one engages in any reasonableness test, one must first evaluate and exclude from any reasonableness analysis any fees of a prohibited nature." Pl. Opp. (doc. #84) at 4. Rather, in order to establish the fee for a certain kind of transaction prevailing in the marketplace, the court must ensure that the fees comprising the market price are not artificially inflated by unlawful fees. The market price must be derived from lawful transactions before it can serve as a point of comparison to evaluate the fairness of a challenged fee. One cannot measure well with a warped yardstick.

3. Application of HUD formula

a. *Services performed*

The first prong of the HUD test asks simply "whether compensable services are performed." Policy Statement, *supra* at 100856; *Schmitz*, 48 F.Supp.2d at 882. Banc One contends that Schuetz's broker provided a variety of consulting and other services. Schuetz does not dispute Banc One's description of the services provided, or deny that she received these services. Instead, she concentrates on the nomenclature used by Banc One in its mortgage financing business to argue that Banc One "purchased" loans in a way prohibited by RESPA. This theory is propounded at length and yet is completely irrelevant. RESPA does not address what lenders may do with loans they finance. Nothing in the Policy Statement suqgests that when a lender accepts a loan application from a broker and pays the broker a yield spread premium, the lender cannot refer to this transaction as the "purchase" of a financial asset. As long as lenders uphold their obligations to ensure that borrowers are informed of settlement procedures and the actual settlement costs are reasonable, they may conduct their business in the terms favored by the secondary market if they prefer. *Cf. Levine v. North American Mortgage*, No. 98-CV-556 (JRT), slip op. at 4-5 (D.Minn. Aug. 6,

1999) ("Levine II") (even if the lender intends that the yield service premium be paid in exchange for the opportunity to finance a high-interest loan, the two-pronged "total compensation" test still applies). The first part of the test is satisfied.

b. *Reasonableness*

Under the second prong, "the totality of the compensation to the mortgage broker for the loan must be examined" to evaluate its correlation to the broker's efforts.

i. *Schuetz's motion*

In her motion for summary judgment, Schuetz offers no evidence purporting to show that the total fee she paid is unreasonable when compared to brokers' fees in similar transactions. She argues that the direct fees fully compensated Home Mortgage for its services, Pl. Motion (doc. #71) at 19, but since she doesn't offer any evidence about how much these services are worth, her contention that they were worth only $1661.00 and not $2177.00 is hard to countenance. Schuetz contends that the $516.00 premium was unreasonable because she never agreed to pay a "yield spread premium," *see id.* at 22, but for the claim Schuetz has brought, her knowledge or intent has no bearing on the legality of the compensation. Moreover, the evidence shows that she did agree to a payment from the lender to the broker. The Good Faith Estimate that Plaintiff signed reflected a yield spread premium of $600 to the mortgage broker. Def. Supp. SOF (doc. #83), Ex. A (Schuetz depo.) at 36-37. Also, she received the Settlement Statement, Def. SOF (doc. #73), Ex. C (Schuetz depo.) at 63, which disclosed a $516.00 "mortgage broker fee." *Id.*, Ex. 7 (attached behind depo. transcript). On the HUD formulation, the reasonableness of the total compensation is an essential element of Schuetz's claim. Due to the total absence of evidence Plaintiff has submitted on this

element, her motion for summary judgment must be denied.[8]

ii. *Banc One's motion*

To establish the reasonableness of the total broker fee Schuetz paid, Banc One relies on the expert report of Randy Howell, who is a mortgage broker, president and CEO of a Phoenix mortgage brokerage, and involved in state and national mortgage broker associations. Def. SOF (doc. #73), Ex. E (Howell report) at 5.[9] Based on his experience in the Phoenix mortgage brokerage industry, Howell stated that the total compensation Schuetz paid her mortgage broker was "reasonably related" to the value the broker contributed to her transaction. *See id.* He also stated that Banc One's payment of a yield spread premium conforms with standard local practice. *See id.* at 5-6.

Without referring to any case law or statutes, Schuetz demands that Howell's testimony be stricken on the grounds that he does not qualify as an expert. *See* Pl. Opp. (doc. #84) at 14-15. She argues his testimony is inadmissible because as a mortgage broker who receives yield spread premiums, Howell has a pecuniary stake in the outcome, and because Howell relies wholly on his personal experience. She contends that because Howell is not disinterested, he should be disqualified.

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[8] "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552 (1986).

[9] Plaintiff asserts that Howell does significant business with Banc One, that he has accepted yield spread premiums from Banc One, and that he anticipates continuing this practice in the future. Pl. Opp. (doc. #84) at 14. She cites to Howell's deposition transcript, but it is not clear where, or whether, the transcript may be found in the record.

a. *Admissibility of Howell's testimony*

There are four factors to consider in determining whether to admit expert testimony: (i) whether the expert is qualified; (ii) whether the subject matter of the testimony is proper for consideration; (iii) whether the testimony conforms to a generally accepted explanatory theory; and (iv) whether the probative value of the testimony outweighs its prejudicial effect. *See Scott v. Ross*, 140 F.3d 1275, 1286 (9th Cir. 1998) (citing *United States v. Castaneda*, 94 F.3d 592, 595 (9th Cir.1996)). Testimony from a qualified expert is not precluded because of a relationship between the witness and one of the parties, *see Hingson v. Pacific S.W. Airlines*, 743 F.2d 1408, 1412 (9th Cir. 1984), notwithstanding allegations of bias. *See United States v. Chang*, 207 F.3d 1169, 1173 (9th Cir. 2000). District courts have wide discretion in deciding whether to admit or exclude expert testimony. *See Salem v. United States Line Co.*, 370 U.S. 31, 35, 82 S.Ct. 1119, 1122 (1962); *United States v. 99.66 Acres of Land*, 970 F.2d 651, 657 (9th Cir. 1992).

Rule 702 contemplates qualification "by knowledge, skill, experience, training or education." Fed. R. Evid. 702. Expertise may arise from any one of these five sources. Charles Alan Wright & Victor James Gold, *Federal Practice & Procedure* § 6265 (1997). Depending on the nature of the testimony to be offered, experience is an acceptable alternative to formal training. *Rogers v. Raymark Industries, Inc.*, 922 F.2d 1426, 1429-1430 (9th Cir. 1991); *Thomas v. Newton International Enterprises*, 42 F.3d 1276, 1269-70 (9th Cir. 1994); *see also United States v, Senchenko*, 133 F.3d 1153, 1157 (9th Cir. 1998) (career wildlife officer qualified by experience and training to testify about market value of bear parts).

While it is true that a witness may qualify as an expert when distinguished by only a modest degree of specialized knowledge, *see United States v. Moore*, 604 F.2d 1228, 1235 (9th Cir. 1979), the generosity of this approach presupposes that the expert has some

specialized knowledge germane to the subject of testimony. In *Moore*, the expert had received a day of training. *See id.* Would-be experts have been excluded due to their lack of pertinent experience. *See Chang*, 207 F.3d at 1172 (expert in international finance excluded because he had no experience identifying counterfeit instruments); *LuMetta v. U.S. Robotics*, 824 F.2d 768, 771 (9th Cir. 1987) (proposed witness on finder fees lacked experience with practices of small computer companies); *99.66 Acres_of Land*, 970 F.2d at 657 (proposed expert excluded for lack of appraisal experience). Thus, simply claiming experience will not suffice to establish qualification. The expert's proponent must persuade the court that the experience enables the witness to impart reliable and helpful knowledge in the present case.[10]

Not only are claims to expert status carefully scrutinized, but also the expertise conferred by a finding of qualification is circumscribed by the limits of that qualification. Where an expert has specialized knowledge on one subject but seeks to testify about a different matter, courts preclude testimony on subjects the expert is not qualified to discuss. *See Rogers*, 922 F.2d at 1431.

In the present case, Schuetz concedes that Howell is a mortgage broker, that he receives yield spread premiums in transactions he brokers, and that his familiarity with yield spread premiums may be inferred from his "[active] lobbying efforts." Therefore, it is undisputed that Howell has relevant experience with yield spread premiums on which to base his opinion. This experience alone suffices for Howell to proffer an opinion; thus, Schuetz's point that he has conducted no statistical analysis only defines the nature of his opinion. Her argument that Howell is biased cannot be considered on the motion to strike. Accordingly, the court accepts

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[10] Where an expert proposes to offer testimony about an issue within the jury's grasp, such testimony may be excluded. *See United States v. Rahm*, 993 F.2d 1405, 1413 (9th Cir. 1993).

Howell's testimony that the total compensation Schuetz paid was reasonably related to the services provided.

b. *Other evidence*

In addition to Howell's report, Banc One relies on the affidavit of Beverly Irene Lacy, who was the office manager of defendant Home Mortgage Financial Corp. Def. SOF (doc. #73), Ex. D (Lacy Aff.) ¶ 1. She testified that the $2,177 Schuetz paid in direct and indirect brokerage fees was "within the usual range of compensation typically received for our services." *Id.* ¶ 10. She continued, "In my opinion, the total compensation Home received for originating Ms. Schuetz's loan was reasonable, considering the work Home had to perform." *Id.*

Schuetz has not challenged Banc One's development of evidence of the market price for judging the total fee she paid, nor has she alleged that the total brokers' fee she paid was unreasonable. Given her silence on both these points, even construing all the facts in the light most favorable to Schuetz, the court concludes that summary judgment in Banc One's favor on the RESPA claims is appropriate.

II. *Federal anti-racketeering claim*

Plaintiff included in her complaint a claim that Defendants violated 18 U.S.C. § 1962(c) (RICO). She has not moved for summary judgment on this claim, *see* Pl. Motion (doc. #71), but Banc One has urged the court to grant judgment against her on this claim. *See* Def. Motion (doc. #72) at 11.[11] Plaintiff responded to Banc One's argument and the issue is fully briefed.

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[11] Curiously, while moving expressly for "summary judgment," Banc One discusses the applicable pleading standard, cites cases where motions to dismiss were granted, and argues that Plaintiff's complaint has failed to state a cause of action because the pleading standard for the predicate acts was not met. Only after moving through these arguments does Banc One contend that the evidence does not support crucial elements of Plaintiff's claim. *See* Def. Motion (doc. #72) at 11-13.

A violation of § 1962(c) requires "(i) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, 105 S.Ct. 3275, 3285 (1985). Racketeering activity is defined to include any act "indictable" under federal law. 18 U.S.C.A. § 1961(1)(B) (West Supp. 1999). In opposing summary judgment, the "predicate" criminal act Schuetz identifies is alleged violations of the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343.

The essential elements of mail fraud under section 1341 are (i) the existence of a scheme to defraud and (2) using or causing the use of the mail to execute the scheme. *See United States v. Serang*, 156 F.3d 910, 914 (9th Cir. 1998). Wire fraud entails the same elements. *California Architectural Building Products, Inc. v. Franciscan Ceramics*, 818 F.2d 1466, 1469 (9th Cir. 1987); *see also United States v. Rude*, 88 F.3d 1538, 1546 (9th Cir. 1996). To prove a fraudulent scheme, specific intent to defraud must be demonstrated. *See United States v. Beecroft*, 608 F.2d 753, 757 (9th Cir. 1979). Intent need not be established by direct evidence, but may be inferred from the defendant's statements and conduct. *See United States v. Sayakhom*, 186 F.3d 928, 941-42, *as amended* 197 F.3d 959 (9th Cir. 1999), *cert. denied* 120 S.Ct. 1216 (Feb. 22, 2000). It has been stated that demanding payment for non-compensable services, or taking kickbacks, can be a "scheme to defraud." *See United States v. Pintar*, 630 F.2d 1270, 1280 (8th Cir. 1980).

Plaintiff's mail fraud assertion amounts to allegations that Banc One sent documents concerning her mortgage loan via mail and fax, and that these documents failed to disclose the true nature of the yield spread premiums, thus falsely representing her borrowing options. As a result of Banc One's dissemination of "deceptive" documents, "Banc One was able to obtain more valuable loans with inflated interest rates and thereafter collect excessive mortgage payments from homeowners such as Plaintiff each month until it ultimately chose to sell the

loans on the secondary market for a higher price." Pl. Opp. (doc. #84) at 24.

Yet while acknowledging that intent to deceive is an essential element of mail fraud, *see* Pl. Opp. (doc. #84) at 24 (quoting *Chisolm v. Transouth Financial Corp.*, 95 F.3d 331, 336 (4th Cir. 1996)), Plaintiff makes no attempt to present evidence showing that Banc One intended to deceive her. *See generally*, Mark Zingale, Note, "Fashioning a Victim Standard in Mail and Wire Fraud: Ordinarily Prudent Person or Monumentally Credible Gull?" 99 Colum. L. Rev. 795, 814 (1999) (arguing that mail fraud cases should turn on culpable intent of defendants). Only bare allegations are before the court on her behalf. As Banc One counters, because yield spread premiums are not presumptively unlawful, *see* Policy Statement, *supra* at 10084, *Culpepper II*, 144 F.3d at 718, the simple fact that Banc One's wholesale lending business is set up in a way that pays such premiums is not prima facie evidence of devious intent. Furthermore, Schuetz has not paused to show that the disclosures Banc One mailed and faxed are objectively likely to deceive. Schuetz argues only that she was confused and that the structure of Banc One's contractual relationship with brokers is unlawful. These lines of argument miss the target Schuetz must hit, for they do not address Banc One's conduct and statements. Plaintiff must show the objective deceptiveness of these to support an inference of fraud.

Other evidence in the record refutes Plaintiff's unsubstantiated suspicions. The undisputed evidence shows that Banc One complied with RESPA's disclosure requirements in its dealings with Schuetz and was forthright about the amount of money that would end up in the hands of her broker. Pursuant to the Good Faith Estimate, which she signed, Schuetz agreed in advance to a mortgage broker fee of $600.00. While Schuetz has subsequently expressed difficulty recalling the documents she saw and signed at the time leading up to closing, *see* MacLin Aff. (doc. #37), Ex. Z (Schuetz dep.)

at 33-34, that she is now at a loss does not prove the inadequacy of Banc One's disclosure at the time of the bargain.[12] Furthermore, Banc One's contract with defendant Home Mortgage Financial Corp. announces a policy to make proper disclosures to borrowers, and emphasizes the importance of compliance. In addition, Schuetz has not rebutted the statement of Jeffrey Smith, who testified that no benefit accrues to Banc One if a loan is concluded at an above-par rate, because the extra interest payment is returned to the broker in the form of the yield spread premium. Without her theory that Banc One benefits from financing above-par loans more than at-par loans, Plaintiff's theory about Banc One's culpable motive falls apart. Because Plaintiff has not alleged any predicate act, let alone a pattern of such activity, it is not necessary to reach Defendant's argument that Schuetz has failed to establish the existence of a criminal enterprise. Banc One is granted summary judgment on the RICO claim.[13]

B. *Arizona unfair and deceptive practices claim*

Schuetz has alleged that Banc One engaged in unfair and deceptive business practices prohibited under state law. While Banc One has requested that the court

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[12] Schuetz has also argued, without specifying her reasons, that the disclosure on the HUD-promulgated settlement statement form is ambiguous. *See* Pl. Response (doc. #85) ¶ 28. Because she does not explain why the statement was ambiguous, the court sees no fact issue about its meaning or the intent behind it.

[13] The court is aware of no RESPA-related RICO claim that has survived summary judgment. Many courts dispatch with these claims on motions to dismiss. *See, e.g., Levine v. North America Mortgage*, No. 98-CV-556 (D.Minn. May 17, 2000) (submitted as Def. Reply (doc. #87), Ex. A); *VanDenBroeck v. Commonpoint Mortgage Co.*, 22 F.Supp.2d 677, 682 (W.D. Mich. 1998). In those instances where courts have denied motions to dismiss, they have consistently observed that the plaintiff's allegations would be held to the fire at the summary judgment stage. *See Briggs v. Countrywide Funding Corp.*, 931 F.Supp. 1545, 1555 (M.D. Ala. 1996), *vacated* 949 F.Supp. 812 (M.D. Ala. 1996); *Kerby v. Mortgage Funding Corp.*, 992 F.Supp. 787, 801 n.5 (D.Md. 1998); *Hastings v. Fidelity Mortgage Decisions Corp.*, 984 F.Supp. 600, 607 (N.D. Ill. 1997).

decline to exercise supplemental jurisdiction over this claim, it argues that abstention is warranted because "the state law claims present complex issues and because they involve significant federal policy considerations . . . ." Def. Mot. (doc. #72) at 13-14. As it turns out, these arguments work to the opposite of the desired effect and persuade the court that it is appropriate to address Schuetz's claim. To the extent that this matter is complex, the court is already conversant with it; to the extent that the allegations coincide with the RICO predicate act allegations, a consistent disposition is desirable; if federal policy is implicated, a federal district court is as well equipped as a state forum to resolve any difficulties.

1. Deceptive sales of lending services

Arizona law provides that:

> The act, use or employment by any person of any deception, deceptive act or practice, fraud, false pretense, false promise, misrepresentation or concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression, or omission, in connection with the sale or advertisement of an merchandise whether or not any person has in fact been misled, deceived, or damaged thereby, is declared to be an unlawful practice.

Ariz. Rev. Stat. Ann. § 44-1522 (West 1994). To prevail, a plaintiff must show that the defendant made some "false promise or misrepresentation" to her, *Nahom v. Blue Cross & Blue Shield of Ariz., Inc.*, 885 P.2d 1113, 1124 (Ariz.App. 1994), and prove her claims by a preponderance of the evidence. *See Dunlap v. Jimmy GMC of Tucson, Inc.*, 666 P.2d 83, 89 (Ariz.App. 1983). Schuetz suggests that the proper test does not look to a defendant's intent but rather examines whether the defendant's course of dealing would mislead the least sophisticated reader. *See Madsen v. Western Am. Mortgage Co.*, 694 P.2d 1228, 1231 (Ariz.App. 1985)

(affidavits supported allegation that broker obtained higher brokerage fees on loans than fees on the written commitment forms).

As described in the preceding section, Schuetz has offered no evidence to back up her allegation that Banc One intentionally undertook to deceive her about the brokerage charges she would pay in connection with her mortgage. *Cf. Madsen*, 694 P.2d at 1233 (affidavits supported allegation that broker obtained higher brokerage fees on loans than fees on the written commitment forms). Schuetz has never laid out in a linear fashion what she considers the deceptive course of dealing of *Banc One* to have been: she has never stated clearly what information she had at what point of the transaction and how what she had or did not have misinformed her. She contends that the existence or nature of the yield spread premium was never discussed or explained to her prior to closing, *see* Pl. Opp. (doc. #84) at 19, but she attributes this omission to her broker, not Banc One. *See* Schuetz dep. at 93-94. She also admits that she signed documents without reading them, *see id.* at 33, and that she did receive HUD's blue booklet explaining the mortgage finance process. *See id.* at 39-40. Given Plaintiff's profound uncertainty about what happened, she cannot prove by a preponderance of the evidence that her confusion – if indeed she was confused at the time she agreed to the loan – is attributable to Banc One. Even considering her testimony in the most favorable light, the court cannot discern any evidence of willful concealment of the brokerage charges by Banc One, nor is there evidence that Banc One's disclosures would deceive the least savvy borrower.

Schuetz attacks another practice of Banc One, alleging she was prevented from obtaining a loan at par rate. Banc One disseminates rate sheets to brokers but requires that the prices and terms be kept confidential. Schuetz argues that her broker's failure to reveal Banc One's par rate constituted a material omission and that Banc One's policy of secrecy is a deceptive practice.

There is no question that disclosure regarding the yield spread premium would have been more forceful if Home Mortgage's broker Mic Laasch had put the Banc One rate sheet in front of Plaintiff and said something like, "Here's the lowest interest rate you could get for your loan without paying discount points. However, we need to make $2,177 on this transaction, and your direct fees are too low by about $500. To make up the shortfall, you need to pay a higher interest rate, for which Banc One will send us a check for $500." Such a conversation never took place.

On the other hand, the concept underlying this process could be explained to Schuetz in other ways. Schuetz does not explain why she needed to see the daily rate sheet, except to argue that she was entitled to transact at the par rate when she dealt with Home Mortgage. She presents no evidence to support this assertion, and it is contradicted by the testimony of her brokers. Because Schuetz was not entitled to obtain a loan at par rate, the court finds that she could not rely on the par rate. Thus, she could not falsely rely on its suppression. Unless concealment of information results in the presentation of a false picture to a plaintiff, no deceptive act has been perpetrated. There is no evidence that Plaintiff was unaware of the options available to her when she agreed to the loan she obtained. Accordingly, the court finds no material dispute on the absence of deception. Summary judgment is granted to Defendant.

2. Deceptive mortgage lending practices

In moving for summary judgment, Plaintiff alleges that Banc One violated Ariz. Rev. Stat. § 6-947(L), which provides: "A mortgage banker shall not make a false promise or misrepresentation or conceal an essential or material fact in the course of the mortgage banker business." Banc One argues that because Plaintiff failed to plead this claim, Plaintiff's arguments regarding this statute should not be considered. Def. Opp. (doc. #82) at 22, n.19. It further argues that the

elements of this statute duplicate the elements of the more general deceptive practices statute. Schuetz did not reply to either argument.

Contrary to Defendant's position, the court finds a potentially significant divergence between the plain language of the two statutes. Unlike the deceptive practices statute, the text of the mortgage banker statute contains no scienter requirement related to the omission of material information. Furthermore, section 6-947(L) prohibits material omissions in the course of the "process," not simply in the sale. To the extent that Schuetz contends that the relationship between the interest rate and the "mortgage broker fee" was never disclosed, even though she agreed to pay the total fee, the court finds she has stated a claim under this statute.

With respect to Banc One's assertion that Schuetz failed to plead this claim, the court disagrees. The pleadings need not identify any particular legal theory under which recovery is sought. *Crull v. GEM Insurance Co.*, 58 F.3d 1386, 1391 (9th Cir. 1995). "[A] short and plain statement of the claim showing that the pleader is entitled to relief" suffices. Fed. R. Civ. P. 8. Since Schuetz raised Banc One's failure to provide her with information about the methods by which her fees were calculated and paid squarely in her complaint, Compl. (doc. #1, 98-CV-284) ¶¶ 48, 87, the court concludes that Banc One has had adequate notice of the underpinnings of this claim.

The record includes no evidence about whether the mechanics of yield spread premiums were disclosed. Banc One argues that because the existence of and approximate amount of a "mortgage broker fee" paid by Banc One was disclosed on the HUD form, Plaintiff had all the information she needed. To the extent Banc One's sole justification for the fee is that Schuetz agreed to pay it, the court cannot accept a position that, as a matter of law, it does not matter that the relationship between the fee and the interest rate was never explained. Because the parties addressed this claim

cursorily at best, the court is unable to decide that either is entitled to summary judgment on it.

3. Unjust enrichment

Lastly, Banc One points out that while Plaintiff seeks summary judgment on her claim for unjust enrichment, her memorandum makes no reference to it. Def. Opp. (doc. #82) at 21, n.18. Banc One sought summary judgment on this issue and briefed it, explaining that one essential element of unjust enrichment is the absence of an alternative legal remedy, but RESPA serves as an adequate vehicle here. *See* Def. Mot. (doc. #72) at 14-15. Another crucial element of unjust enrichment is lack of justification for enrichment of the defendant; Banc One argues that not only was it not enriched by selling loans above-par, but also there is no evidence that it was unjustifiably enriched. Plaintiff neglected to respond to Banc One's contention. *See* Pl. Opp. (doc. #72). As a consequence of this lapse, no facts support Plaintiff's claim. Finding Defendant's rationale and presentation of the evidence persuasive, the court grants Defendant judgment on this claim as well.

THEREFORE IT IS ORDERED, granting in part and denying in part Defendant's Motion for Summary Judgment (doc. #72).

Plaintiff's Motion for Summary Judgment (doc. #71) is denied.

DATED this 14th day of September, 2000.

/s/ ROBERT C. BROOMFIELD

Robert C. Broomfield
Senior United States District
Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 97-2195-PHX-RCB

CAROLINE RICHTER,
AND ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

BANC ONE MORTGAGE CORP., AND
PORTFOLIO MORTGAGE CO., INC.,
Defendants.

No. CIV 98-284-PHX-RCB

BETTINA J. SCHUETZ,
AND ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

v.

BANC ONE MORTGAGE CORP., AND
HOME MORTGAGE CORP., A/K/A HOME MORTGAGE
FINANCIAL CORP.,
Defendants.

[March 19, 1999]

ORDER

Pending before the court is Plaintiffs' motion for class certification against Banc One Mortgage Corp. ("Banc One"). The court heard oral argument on March 1, 1999, and took the matter under advisement at that time. Having carefully considered the arguments raised by both parties, the court is now prepared to rule on the motion.

I. BACKGROUND

A. REAL ESTATE SETTLEMENT PROCEDURES ACT

The primary causes of action that Caroline Richter ("Richter") and Betty Schuetz ("Schuetz") (collectively "Plaintiffs") attempt to certify for class action are for alleged violations of the Real Estate Settlement Procedures Act ("RESPA"). Before the court even discusses the facts of this case, a short analysis of RESPA is necessary, as it will provide the necessary framework for the facts and arguments raised by both parties.

Congress enacted RESPA to protect consumers from "unnecessarily high settlement charges caused by certain abusive practices," including kickbacks and referral fees. 12 U.S.C. § 2601. In furtherance of this goal, RESPA prohibits both referral fees and the splitting of charges in any business incident to or a part of real estate settlement services. The relevant section prohibiting referral fees states:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage shall be referred to any person.

12 U.S.C. § 2607(a). The relevant section prohibiting the splitting of charges states:

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

12 U.S.C. § 2607(b). Under RESPA, the term "settlement services" includes any service in connection with a real estate settlement, including services rendered by a real estate broker. *See* 12 U.S.C. § 2602(3).

Although RESPA generally prohibits referral fees and duplicative charges, it creates an exception for payments for goods or services. RESPA specifically states:

> Nothing in this section shall be construed as prohibiting . . . the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed.

12 U.S.C. § 2607(c).

The primary circuit court authority on RESPA violations in the context of yield spread premiums[1] is Culpepper v. Inland Mortgaqe Corp., 132 F.3d 692 (11th Cir. 1998), as modified, 144 F.3d 717 (11th Cir. 1998). In *Culpepper*, the Eleventh Circuit established several rules. First, a payment constitutes a referral fee if "(i) a payment of a thing of value is (2) made pursuant to an agreement to refer settlement business and (3) a referral actually occurs." *Id.* at 696. Second, yield spread premiums are referral fees. *Id.* Third, a two-part test exists to determine whether a referral/duplicative fee fits within the exception for a legitimate payment for goods and/or services: (1) was the payment for a good or service; and (2) if it was for a good or service, was the payment so excessive or unreasonable that part of the payment actually constitutes a referral fee. *Id.* at 696-97. Fourth, yield spread premiums do not constitute payments for goods because the mortgage broker never owns the loan and thus cannot transfer it. *Id.* at 696. Fifth, under the circumstances in that case, the yield spread premium did not constitute a payment for services. *Id.* at 696-97; *Culpepper v. Inland Mortgage Corp.*, 144 F.3d 717, 718-19 (11th Cir. 1998). However, the court did not determine that yield spread premiums are *per se* illegal under RESPA. *See Culpepper*, 144 F.3d at 718.

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[1] Plaintiffs' primary RESPA challenge is of Banc One's payment of yield spread premiums to mortgage brokers.

With this brief analysis of RESPA in mind, the court will now proceed to the particular facts of this case.

B. GENERAL FACTUAL BACKGROUND OF THE CASE

Banc One is a mortgage lender and servicer of residential mortgages that conducts business operations throughout the United States. Banc One acts as both a retail and wholesale lender. As a retail lender, it provides a wide variety of services required to complete the loan package, qualify the borrower, and process the loan for closing. When Banc One conducts lending operations on the wholesale level, third parties, such as mortgage brokers, provide many of these services. At issue in this case are Banc One's wholesale operations.

Banc One has contracts with 600 to 700 mortgage brokers throughout the country, whereby the brokers agree to sell prospective loan packages to Banc One for funding. Banc One and the brokers determine the purchase price for an individual prospective loan package at the time the broker offers the package to Banc One, and the price is determined from daily "rate sheets" issued by Banc One. Banc One funds approximately 5,000 loans a year through such agreements with mortgage brokers.

Banc One uses a standard lender-broker contract, called a "Single Family Purchase Agreement," in its dealings with all of these mortgage brokers. This contract provides that the mortgage broker may, from time to time, offer to sell loans to Banc One under the terms of the contract.[2] The contract states that the purchase price for each loan is to be determined at the time the loan is offered by the mortgage broker. The contract also states that its terms constitute the "entire transaction between the parties, covering everything agreed upon or understood in the transaction."

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[2] Although the contract discusses the sale of "loans," it is this court's understanding that the contract is referring to the prospective loan packages earlier mentioned by this court.

The specific conduct engaged in by Banc One at its wholesale lending level that Plaintiffs challenge are fees or premiums paid by Banc One to mortgage brokers. Plaintiffs challenge several types of fees and premiums, including yield spread premiums, bonuses paid on the basis of the size of the loan, and premiums paid for loans originated in certain geographic regions of the country.[3] However, the focus of Plaintiffs' motion is on yield spread premiums.

Yield spread premiums are payments by mortgage lenders to mortgage brokers on "above par" loans brought to the lender by the broker. An above par lean is one that has an interest rate above the lowest rate that a lender will offer without charging discount points. Mortgage lenders do not pay yield spread premiums if the loan is at or below the par rate.

In the fall of 1995, Richter wished to obtain financing for the purchase of a home in Chandler, Arizona. Portfolio Mortgage Company ("Portfolio Mortgage") acted as Richter's mortgage broker throughout her search for financing, and Richter dealt directly with Portfolio Mortgage rather than the eventual mortgage lender, Banc One. At the closing in October of 1995, Banc One funded the loan and was designated as lender on the mortgage and note. Banc One funded the loan pursuant to an agreement it had reached with Portfolio Mortgage.

Richter's loan closed for a total principal amount of $55,000 with an interest rate of 8.125%, which was above the "par rate" at which Banc One was willing to fund the loan. On the U.S. Department of Housing and Urban Development Settlement Statement ("HUD-1

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[3] Although Plaintiffs mentioned in a footnote to their motion for class certification alleged bonus payments made by Banc One to brokers based on the total volume of loans sent to it for funding, Plaintiffs do not argue for certification of any class of borrowers affected by such alleged bonuses. In fact, the only evidence Plaintiffs raise regarding such bonus payments involves Valley National Mortgage Company, the predecessor to Banc One. (*See* Pls.' Mem. in Supp. Of Mot. for Class Certification at 14 n.16.)

Settlement Statement"), a payment of $1,375.00 from Banc One to Portfolio Mortgage was disclosed. According to a Banc One funding control worksheet, this $1,375.00 payment consisted of a $756.25 yield spread premium and a $618.75 fee for acquisition of servicing rights. The HUD-1 Settlement Statement also indicated that Richter paid Portfolio Mortgage $550.00 for a loan origination fee, $275.00 for an appraisal fee, $55 00 for a credit report fee, $250.00 for a processing fee, and $50.00 for a courier fee.

Richter claims that the HUD-1 Settlement Statement only ambiguously disclosed the payment by Banc One to Portfolio Mortgage of the yield spread premium. Banc One claims that on various occasions Richter received oral and written disclosures concerning interest rates, points, and other costs, specifically including the fact that the lender might pay certain fees to Portfolio Mortgage for its services rendered in connection with her loan.

On or about August 7, 1997, Schuetz closed a mortgage loan. Schuetz also hired a mortgage broker, Home Mortgage Financing ("Home Mortgage"), to help her in the loan process. After being contacted by Home Mortgage, Banc One ultimately funded Schuetz's loan at an above par rate. The loan closed for a principal amount of $68,800 with a 7.5% interest rate.

As with Richter, the HUD-1 Settlement Statement Schuetz received at the closing disclosed a payment of $516.00 by Banc One to Home Mortgage. Schuetz also paid Home Mortgage a $688.00 loan discount fee, a $275.00 appraisal fee, a $55.00 credit report fee, and a $285.00 processing fee.

C. GENERAL ARGUMENTS RAISED BY THE PARTIES

The parties apparently agree on the fact that Banc One pays yield spread premiums to mortgage brokers, including Portfolio Mortgage and Home Mortgage. What

the parties disagree upon is the nature of these payments and their purpose.

Plaintiffs contend that Banc One pays the yield spread premiums to mortgage brokers solely in return for the referral of prospective loans with high interest rates. In support of this contention, Plaintiffs point to the terms of Banc One's standard Single Family Purchase Agreement ("Purchase Agreement") entered into with mortgage brokers and statements by Banc One employees during depositions. Pointing to a clause in the Purchase Agreement, Plaintiffs argue that the terms of the agreement constitute everything agreed upon between Banc One and the mortgage broker. Meanwhile, the Purchase Agreement only discusses the purchase and sale of "loans," not any services or facilities to be provided by the broker with regard to the loan. Furthermore, the "loans" cannot constitute goods that the broker has to sell because the broker never funds the loans, rather Banc One underwrites and funds the loans at closing.

Plaintiffs also rely on statements made by John Clay Douglas ("Douglas"), Banc One's senior vice president, during a deposition in this lawsuit. Douglas stated that Banc One is in the business of buying loans and the brokers it deals with bring loans to Banc One to he bought. Douglas also testified that the premium payments Banc One makes are calculated according to the rate sheets, and, according to Plaintiffs, these rate sheets demonstrate that the premium Banc One pays is tied solely to the interest rate on the referred loan.

Plaintiffs contend that any argument by Banc One that the yield spread premiums compensate mortgage brokers for services performed during the loan transaction is in conflict with its Purchase Agreement. The only consideration recited in the Purchase Agreement for the payment of the yield spread premium was the sale of a loan, not any services rendered.

On the other hand, Banc One contends that mortgage brokers provide several services and facilities in

conjunction with loan transactions involving Banc One and that the yield spread premium constitutes one form of payment for these services. Relying on affidavits given by the presidents of Portfolio Mortgage and Home Mortgage, Banc One lists the services provided by these mortgage brokers. These services include acquiring information from the prospective borrower, filling out the loan application, pre-qualifying the prospective borrower to determine the maximum mortgage she can obtain, verifying information given by the borrower, arranging for property appraisals, and participating in the loan closing.

According to Banc One, the yield spread premiums are meant to provide choices for the borrower and broker in terms of how the broker will be compensated for its services. If the borrower chooses a higher interest rate (i.e., one above par), she can avoid some or even all of the up-front costs charged by the mortgage broker for its services because Banc One will compensate the mortgage broker through the use of the yield spread premium. On the other hand, the borrower can obtain a lower interest rate (i.e., one below par) if she is willing to pay more up-front costs, including fees for the broker's services and discount points owed to the lender. The exact composition of the broker's compensation depends upon the terms negotiated beuween the broker and the borrower. Banc One claims it makes no difference to it whether it purchases an above par loan because the benefit it gains from the higher interest rate eventually makes its way back to the borrower due to lower up-front costs for the broker's services.

D. CLASS THAT PLAINTIFFS SEEK TO CERTIFY

Plaintiffs seek certification of the following class: all persons residing in the United States who from six years from the date of the filing of this action through and including the present (1) obtained a federally related home loan; (2) where a mortgage broker registered or referred the loan to Banc One to act as the lender; (3) where the mortgage broker and Banc One were in an

ongoing relationship to refer settlement business; (4) where a yield spread premium, service release premium, premium pricing, par plus premium, yield differential, lender paid broker fee, or the like was paid to the class member's mortgage broker by Banc One; (5) where the borrower paid to the mortgage broker a loan origination fee, loan discount, processing fee, broker fee, or other direct compensation for the settlement services provided by the broker; and (6) where the Defendant owned the loan, including the servicing rights, at closing by funding or table funding the loan.[4]

II. DISCUSSION

A. RULE 23(a) CLASS CERTIFICATION STANDARDS

Federal Rule of Civil Procedure 23(a) enumerates four requirements a court must find present before certifying a class action:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a) .

Although Plaintiffs bear the burden of proving the requirements of Rule 23 (a), for purposes of this motion the court will assume, without deciding, that the requirements have been met. The court makes this assumption for two reasons. First, several of the Rule 23(a) requirements are subsumed into the more rigorous Rule 23(b)(3) requirements. For example, the predominance requirement of Rule 23(b)(3) overshadows the

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[4] A loan is table funded when the mortgage broker is the nominal lender on the loan documents but the mortgage lender advances the broker the funds needed for the loan and the broker contemporaneously assigns the loan to the lender.

issues raised by Rule 23(a)'s commonality requirement. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998). Second, as it will discuss in the section immediately following, the court finds that Plaintiffs have not met the requirements of Rule 23(b). Therefore, an analysis of the Rule 23(a) requirements is unnecessary.[5]

B. RULE 23(b) CLASS CERTIFICATION STANDARDS

To maintain a class action, a party must meet not only the prerequisites of Rule 23(a) but also the requirements outlined in either Rule 23(b)(1), (b)(2), or (b)(3). In their motion for class certification, Plaintiffs seek to maintain the class action under both Rule 23(b)(2) and (b)(3).

A class action can proceed under Rule 23(b)(2) if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). Although Plaintiffs raised Rule 23(b)(2) in their motion for class certification, they make no arguments in support thereof in their memorandum in support of their motion. Even if Plaintiffs had attempted to justify class certification under Rule 23(b)(2), they would have failed because their suit seeks predominantly monetary damages and Rule 23(b)(2) does not extend to such cases.[6] *See Nelsen v. King County*, 895 F.2d 1248, 1254-55 (9th Cir. 1990).

The focus of the briefings submitted to this court has been on certification under Rule 23(b)(3). Class certification under Rule 23(b)(3) is appropriate if two require-

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[5] Because the court need not engage in the Rule 23(a) analysis, it need not consider Banc One's argument that Richter would not provide adequate representation because she is potentially subject to a statute of limitations defense.

[6] Plaintiffs, in fact, seek treble damages against Banc One under RESPA.

ments are met. First, questions of fact or law common to the class must predominate over questions affecting only individual members. Second, the court must find the class action vehicle superior to all other available methods for the fair and efficient adjudication of the litigation.

The predominance inquiry asks whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Hanlon*, 150 F.3d at 1022. Mere commonality of factual or legal questions is not enough, rather the court must focus on the relationship between the common and individual issues. *Id.* Common questions of fact and/or law predominate when they constitute a significant aspect of the case and can be resolved for all members in a single adjudication. *Id.* The predominance requirement is satisfied "when there exists generalized evidence that proves or disproves [an] element on a simultaneous, class-wide basis." *In re Workers' Compensation*, 130 F.R.D. 99, 108 (D. Minn. 1990) (quoting *In re Indus. Gas Antitrust Litig.*, 100 F.R.D. 280, 288 (N.D. Ill. 1983)). The critical question is whether the issues of individual class members will overwhelm the issues common to all class members and thereby render the class action form worthless. *Milberg v. Lawrence Cederhurst Fed. Sav. & Loan Ass'n*, 68 F.R.D. 49, 52 (E.D.N.Y. 1975).

In making the class certification determination, "the court is bound to take the substantive allegations of the complaint as true" and may not consider the merits of the plaintiffs' claims. *See Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975), *cert. denied*, 429 U.S. 816, 97 S. Ct. 57 (1976). However, the court is not obligated to accept the plaintiffs' allegations regarding the suitability of the litigation to a class action. *See Mateo v. M/S Kiso*, 805 F. Supp. 761, 771 (N.D. Cal. 1991). The court must, in fact, conduct a rigorous analysis of the class action allegations to determine whether the requirements of Rule 23 are met. *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160, 102 S. Ct. 2364,

2372 (1982). Furthermore, "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469, 98 S. Ct. 2454, 2458 (1978) (quoting *Mercantile Nat'l Bank at Dallas v. Langdeau*, 371 U.S. 555, 558, 83 S. Ct. 520, 522 (1963)); *see Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992) (court can consider evidence relating to Rule 23 requirements even if it also goes to merits of the case).

The key class certification issue arising in this case is "enmeshed" in the factual and legal issues of Plaintiffs' RESPA claims. The primary issue raised by Plaintiffs and Banc One regarding the predominance inquiry involves the proper legal analysis of RESPA claims in conjunction with yield spread premiums. Plaintiffs contend that either yield spread premiums are *per se* illegal or that Banc One's standard Purchase Agreement with mortgage brokers demonstrates the illegality of Banc One's yield spread premiums. Either way, according to Plaintiffs, generalized evidence exists permitting them to prove Banc One's RESPA violations on a class-wide basis, without any need for individualized analysis. Banc One, on the other hand, contends that the court must evaluate yield spread premiums on a case-by-case basis. Despite the language of its Purchase Agreement, mortgage brokers provide services that are compensated both through payments by the borrowers and by payments from Banc One. The court must analyze each individual borrower's situation to determine whether the yield spread premium actually constituted a payment for such services.

The court first notes that under *Culpepper* Banc One is apparently foreclosed from arguing either that the yield spread premiums do not constitute referral fees or that the yield spread premiums qualify under the exception for compensation for goods actually furnished. The Eleventh Circuit in *Culpepper* decided both of these questions in Plaintiffs' favor. *See Culpepper*, 132 F.2d

at 695-96. On the other hand, Plaintiffs are foreclosed from arguing that yield spread premiums are *per se* illegal. *See Culpepper*, 144 F.3d at 718.[7] Therefore, the issue that will most likely arise in this litigation is whether the yield spread premiums paid by Banc One qualify under the exception for compensation for facilities actually furnished or services actually performed. For purposes of class certification, the court must decide whether it can resolve this issue on a class-wide basis through generalized evidence or whether it must conduct a separate review of each individual class member's situation.

Several federal district courts have decided the issue of class certification of RESPA claims in the context of yield spread premiums. Before *Culpepper*, the vast majority of these courts denied class certification on the basis that individual issues would predominate because the court would have to compare the reasonableness of the amount of the yield spread premium to the services actually performed by the mortgage broker. *See, e.g., Marinaccio v. Barnett Banks, Inc.*, 176 F.R.D. 104, 106 (S.D.N.Y. 1997); *Moniz v. CrossLand Mortgage Corp.*, 175 F.R.D. 1, 3-4 (D. Mass. 1997).

The Eleventh Circuit in *Culpepper*, however, made it clear that the reasonableness of the yield spread premium only becomes relevant if the court determines that the mortgage lender paid the yield spread premium for the performance of services. If the yield spread premium was not paid for the performance of services, then it could not possibly fit within RESPA's exception, no matter how reasonable it was in light of services actually performed. *See Culpepper*, 132 F.3d at 697.

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[7] The Department of Housing and Urban Development ("HUD") recently issued a statement taking the like position that yield spread premiums are not *per se* illegal. *See* Department of Hous. & Urban Dev., *Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers* (Feb. 22, 1999).

Plaintiff relies on two district court decisions rendered after *Culpepper* that both granted class certification of RESPA claims involving yield spread premiums, *Brancheau v. Residential Mortgage*, 182 F.R.D. 579 (D. Minn. 1998), and *Mulligan v. Choice Mortgage Corp. USA*, 1998 WL 544431 (D.N.H. Aug. 11, 1998).[8] In *Brancheau*, the plaintiffs sought to certify a class of all borrowers who went through one specific mortgage broker and one specific mortgage lender. *See Brancheau*, 182 F.R.D. at 588-89. The Minnesota district court found that on the basis of *Culpepper* common questions predominated and class certification was appropriate because the issue of the reasonableness of the amount of the yield spread premium was irrelevant if the plaintiffs could demonstrate that the premium was not paid to compensate the mortgage broker for services performed. *Id.* at 590-91. The court found that the plaintiffs would use generalized evidence to try to prove that these premiums were not paid for services rendered. *Id.* at 590. This evidence included the fact that the yield spread premiums were tied to the interest rate and the value of servicing rights for each loan. Furthermore, a clause in the standard contract between the lender and the broker expressly provided that all compensation for the broker's services was to be paid by the prospective borrower, not the lender. *See id.* at 586. That apparently is not the situation in this case.

Since *Culpepper*, however, most district courts have continued denying class certification in RESPA cases challenging yield spread premiums. *See, e.g., Taylor v. Flagstar Bank*, 181 F.R.D. 509 (M.D. Ala. 1998); *Hinton v. First Am. Mortgage*, 1998 WL 111668 (N.D. Ill. Mar. 3, 1998). The Alabama district court in *Taylor* provided the most in-depth discussion of the basis for denying class certification even after *Culpepper*. The court found that the *Culpepper* decision was limited to its particular facts, including the fact that the only evidence in

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[8] The court will limit its discussion to *Brancheau* because both cases involve similar reasoning and *Mulligan* is an unpublished decision.

the record indicated that the compensation by the borrower to the broker was intended to fully compensate the broker for its services. *See Taylor*, 181 F.R.D. at 513; *see also Culpepper*, 144 F.3d at 718-19 (stating that the record did not contain any evidence that the borrower's payments to the broker constituted anything less than complete payment for the broker's services, but that the mortgage lender could attempt to prove otherwise at trial). The *Taylor* court, therefore, found that after *Culpepper* an individualized issue still remained regarding yield spread premiums under RESPA, namely whether in each specific case the borrower and broker intended the borrower's payments to constitute full compensation for services rendered by the broker. *Taylor*, 181 F.R.D. at 523.

This court agrees with the conclusion reached in *Taylor*. In *Culpepper*, the Eleventh Circuit stated that a mortgage lender or broker charged with a RESPA violation could attempt to prove that the borrower and broker did not intend for the borrower to completely compensate the broker for its services, leaving open the possibility that the lender's fees could constitute additional compensation.[9] The Eleventh Circuit only determined that the record before the district court on the defendant's motion for summary judgment contained no proof that the borrower and broker did not intend for the borrower's payments to the broker to constitute full payment for the broker's services. The court in *Brancheau* failed to consider the right of the defendants to offer such individualized evidence.[10] Like the district

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[9] In fact, the Deparnment of Housing and Urban Development ("HUD") has issued statements apparently contemplating the legality of a broker's fees being paid by both the borrower and the mortgage lender. *See, e.g., Buying Your Home: Settlement Costs & Helpful Info., reprinted in* 62 Fed. Reg. 31983, 31990 (Dep't of Hous. & Urban Dev., June 11, 1997) ("Your mortgage broker may be paid by the lender, you as the borrower, or both.").

[10] The court also notes that in *Brancheau*, the class was bringing RESPA claims against one specific mortgage broker and one specific mortgage lender. Perhaps the court felt that questions regarding the

court in *Taylor*, this court concludes that the question of the borrower and broker's intent regarding payments for the broker's services will require a case-by-case analysis of each broker and borrower's specific situation. This conclusion is especially true in a case such as this where upwards of 600 to 700 different mortgage brokers are involved.

Plaintiffs further argue that Banc One's standard Purchase Agreement with its brokers and Douglas' deposition foreclose any argument by Banc One that the yield spread premiums constituted compensation for mortgage brokers' services. Therefore, unlike *Taylor*, no individualized assessment of the intent of borrowers and brokers regarding the payment of the brokers' fees is necessary. The court finds, however, that even if the Purchase Agreement and portions of Douglas' testimony provide some evidence that Banc One did not pay the yield spread premiums in return for services performed by the broker, such evidence would not foreclose Banc One from offering its own evidence that in an individual case the borrower and broker did not intend for the borrower to pay all of the broker's compensation, but rather intended a combination of payments from both the borrower and the mortgage lender, Banc One.[11] The court notes that in *Brancheau*, the plaintiffs offered evidence of a contract between the lender and the broker that stated the lender was not to compensate the broker for any of the services it rendered. *Brancheau*, 182 F.R.D. at 586. Yet the court there found that a fact question remained as to whether the yield spread premiums were within the RESPA exception for payments for services

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intent of the broker and borrowers for the payment of fees could be determined on a class-wide basis when only one broker was involved.

[11] In fact, Banc One has already offered an affidavit from the president of Portfolio Mortgage stating that the payments by Richter to Portfolio Mortgage were not enough to compensate it for all services it rendered in connection with her loan, and without the fee paid by Banc One, Richter would have owed more money to Portfolio Mortgage at the time of closing.

performed. *See id.* at 585-87 (denying plaintiffs' motion for summary judgment on the RESPA claim). Likewise, Banc One's standard Purchase Agreement and Douglas' statements do not necessarily require a finding of a RESPA violation. Instead, Banc One will have an opportunity to present evidence for each individual loan that the parties intended Banc One to pay part of the broker's fees for services performed.

Plaintiffs make one further argument that because part of the payment Banc One makes to mortgage brokers is for acquisition of servicing rights, this payment cannot logically also be for purported services. This argument mirrors Plaintiff's earlier argument that payments of yield spread premiums based solely on interest rates cannot possibly compensate brokers for services rendered. As before, this argument fails because Banc One must still have the opportunity to prove in each individual case that the payment was intended by the broker and borrower to partially compensate the broker for services rendered. *See Culpepper*, 144 F.3d at 718-19; *see also Taylor*, 181 F.R.D. at 523 ("The Defendant might prove – maybe just in a single transaction, but perhaps in all of the transactions – that the yield spread premium represented additional payment for the broker's services . . . .").

The court finds that individualized issues will predominate any common questions regarding Plaintiffs' RESPA claims on the basis of yield spread premiums. In their motion for class certification, Plaintiffs also assert that a class can be certified to challenge other payments made by Banc One to mortgage brokers, namely extra fees paid to brokers for larger loans and paid to brokers in certain geographic locations. However, the court finds that the same individualized issues that predominate the Plaintiffs' challenge of yield spread premiums will also predominate any litigation over these other fees. Once again, the court would have to determine whether these fees constituted a form of

compensation to the broker for services it rendered.[12] Therefore, the court will also deny Plaintiffs' request to certify a class action for these additional RESPA claims.[13]

III. CONCLUSION

In sum, the court will deny class certification of Plaintiffs' RESPA claims. The court finds that, even after *Culpepper*, individualized issues predominate over any common questions. Therefore, Plaintiffs cannot maintain the class action under Rule 23(b)(3).

The court's decision to deny class certification certainly does not foreclose either or both Richter and Schuetz from prevailing on the merits of their RESPA claims. The court merely finds that, to decide the RESPA claims on their merits, individualized determinations will be required regarding each borrower's and each broker's

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[12] An additional problem exists regarding certification of a class to challenge these other fees. The two named plaintiffs, Richter and Schuetz, took out loans beneath the level at which Banc One begins paying extra fees based on the size of the loan, namely $100,000. Furthermore, Richter and Schuetz have offered no evldence that they financed their loans in geographical regions where Banc One pays brokers extra premiums. Therefore, Richter and Schuetz may not present claims typical of the entire class. The burden was on Plaintiffs to prove such typicality.

[13] In a footnote to their motion for class certification, Plaintiffs also contend that class certification of their claim for unfair and deceptive trade practices is appropriate. (Pls.' Mem. in Supp. of Mot. for Class Certification at 24 n.18.) Defendants did not respond to this contention. The basis for the unfair trade practices claim is the fact that Banc One paid referral fees to brokers without disclosing this fact to borrowers and that these fees caused brokers to forsake their obligation to find the best interest rates available to borrowers. Once again, Plaintiff's claim depends upon the individualized issue of whether each specific borrower and each specific broker intended for all broker compensation to come from the borrower. If Banc One can prove in an individual case that the broker and borrower intended for Bane One to pay part of the broker's compensation in the form of a yield spread premium, no unfair or deceptive trade practice would have occurred. Therefore, like the RESPA claims, common issues do not predominate and class certification is inappropriate.

intent on how the broker would be compensated for its services.

IT IS ORDERED denying Plaintiffs' Motion for Class Certification Against Defendant Banc One Mortgage Corp., filed October 1, 1998 (doc. #27).

DATED this 19th day of March, 1999.

/s/ ROBERT C. BROOMFIELD

Robert C. Broomfield
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-16206

BETTINA J. SCHUETZ,
Plaintiff/Appellant,
and
CAROLINE RICHTER,
AND ALL OTHERS SIMILARLY SITUATED,
Plaintiff,
v.
BANC ONE MORTGAGE CORPORATION,
Defendant/Appellee.

D.C. No. CV-97-02195-RCB District of Arizona
(Phoenix)

[August 8, 2002]

Before: RYMER, KLEINFELD AND McKEOWN, Circuit Judges.

A majority of the panel voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc. Judge Kleinfeld voted to grant the petition for panel rehearing and to grant the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX E

Statutory Provisions

The Real Estate Settlement Procedures Act of 1974 ("RESPA"), 12 U.S.C. §§ 2601 *et seq.*, provides in pertinent part as follows:

12 U.S.C. § 2601. Congressional findings and purpose

(a) The Congress finds that significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country. The Congress also finds that it has been over two years since the Secretary of Housing and Urban Development and the Administrator of Veterans' Affairs submitted their joint report to the Congress on "Mortgage Settlement Costs" and that the time has come for the recommendations for Federal legislative action made in that report to be implemented.

(b) It is the purpose of this chapter to effect certain changes in the settlement process for residential real estate that will result –

(1) in more effective advance disclosure to home buyers and sellers of settlement costs;

(2) in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services;

(3) in a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance; and

(4) in significant reform and modernization of local recordkeeping of land title information.

12 U.S.C. § 2602. Definitions

For purposes of this chapter –

(1) the term "federally related mortgage loan" includes any loan (other than temporary financing such as a construction loan) which –

(A) is secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property; and

(B)(i) is made in whole or in part by any lender the deposits or accounts of which are insured by any agency of the Federal Government, or is made in whole or in part by any lender which is regulated by any agency of the Federal Government; or

(ii) is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by the Secretary or any other officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary or a housing or related program administered by any other such officer or agency; or

(iii) is intended to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, or a financial institution from which it is to be purchased by the Federal Home Loan Mortgage Corporation; or

(iv) is made in whole or in part by any "creditor", as defined in section 1602(f) of title 15, who makes or invests in residential real estate loans aggregating more than $1,000,000 per year, except that for the purpose of this chapter, the term "creditor" does not include any agency or instrumentality of any State;

(2) the term "thing of value" includes any payment, advance, funds, loan, service, or other consideration;

(3) the term "Settlement services" includes any service provided in connection with a real estate settlement including, but not limited to, the following: title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker, the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans), and the handling of the processing, and closing or settlement;

(4) the term "title company" means any institution which is qualified to issue title insurance, directly or through its agents, and also refers to any duly authorized agent of a title company;

(5) the term "person" includes individuals, corporations, associations, partnerships, and trusts;

(6) the term "Secretary" means the Secretary of Housing and Urban Development;

(7) the term "affiliated business arrangement" means an arrangement in which (A) a person who is in a position to refer business incident to or a part of a real estate settlement service involving a federally related mortgage loan, or an associate of such person, has either an affiliate relationship with or a direct or beneficial ownership interest of more than 1 percent

in a provider of settlement services; and (B) either of such persons directly or indirectly refers such business to that provider or affirmatively influences the selection of that provider; and

(8) the term "associate" means one who has one or more of the following relationships with a person in a position to refer settlement business: (A) a spouse, parent, or child of such person; (B) a corporation or business entity that controls, is controlled by, or is under common control with such person; (C) an employer, officer, director, partner, franchisor, or franchisee of such person; or (D) anyone who has an agreement, arrangement, or understanding, with such person, the purpose or substantial effect of which is to enable the person in a position to refer settlement business to benefit financially from the referrals of such business.

12 U.S.C. § 2603. Uniform settlement statement

(a) The Secretary, in consultation with the Administrator of Veteran's Affairs, the Federal Deposit Insurance Corporation, and the Director of the Office of Thrift Supervision, shall develop and prescribe a standard form for the statement of settlement costs which shall be used (with such variations as may be necessary to reflect differences in legal and administrative requirements or practices in different areas of the country) as the standard real estate settlement form in all transactions in the United States which involve federally related mortgage loans. Such form shall conspicuously and clearly itemize all charges imposed upon the borrower and all charges imposed upon the seller in connection with the settlement and shall indicate whether any title insurance premium included in such charges covers or insures the lender's interest in the property, the borrower's interest, or both. The Secretary may, by regulation, permit the deletion from the form prescribed under this section of items which are not, under local

laws or customs, applicable in any locality, except that such regulation shall require that the numerical code prescribed by the Secretary be retained in forms to be used in all localities. Nothing in this section may be construed to require that that part of the standard form which relates to the borrower's transaction be furnished to the seller, or to require that that part of the standard form which relates to the seller be furnished to the borrower.

(b) The form prescribed under this section shall be completed and made available for inspection by the borrower at or before settlement by the person conducting the settlement, except that (1) the Secretary may exempt from the requirements of this section settlements occurring in localities where the final settlement statement is not customarily provided at or before the date of settlement, or settlements where such requirements are impractical and (2) the borrower may, in accordance with regulations of the Secretary, waive his right to have the form made available at such time. Upon the request of the borrower to inspect the form prescribed under this section during the business day immediately preceding the day of settlement, the person who will conduct the settlement shall permit the borrower to inspect those items which are known to such person during such preceding day.

12 U.S.C. § 2605. Servicing of mortgage loans and administration of escrow accounts

(a) Disclosure to applicant relating to assignment, sale, or transfer of loan servicing

Each person who makes a federally related mortgage loan shall disclose to each person who applies for the loan, at the time of application for the loan, whether the servicing of the loan may be assigned, sold, or transferred to any other person at any time while the loan is outstanding.

(b) Notice by transferor of loan servicing at time of transfer

(1) Notice requirement

Each servicer of any federally related mortgage loan shall notify the borrower in writing of any assignment, sale, or transfer of the servicing of the loan to any other person.

(2) Time of notice

(A) In general

Except as provided under subparagraphs (B) and (C), the notice required under paragraph (1) shall be made to the borrower not less than 15 days before the effective date of transfer of the servicing of the mortgage loan (with respect to which such notice is made).

(B) Exception for certain proceedings

The notice required under paragraph (1) shall be made to the borrower not more than 30 days after the effective date of assignment, sale, or transfer of the servicing of the mortgage loan (with respect to which such notice is made) in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by –

(i) termination of the contract for servicing the loan for cause;

(ii) commencement of proceedings for bankruptcy of the servicer; or

(iii) commencement of proceedings by the Federal Deposit Insurance Corporation or the Resolution Trust Corporation for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

(C) Exception for notice provided at closing

The provisions of subparagraphs (A) and (B) shall not apply to any assignment, sale, or transfer of the

servicing of any mortgage loan if the person who makes the loan provides to the borrower, at settlement (with respect to the property for which the mortgage loan is made), written notice under paragraph (3) of such transfer.

(3) Contents of notice

The notice required under paragraph (1) shall include the following information:

(A) The effective date of transfer of the servicing described in such paragraph.

(B) The name, address, and toll-free or collect call telephone number of the transferee servicer.

(C) A toll-free or collect call telephone number for (i) an individual employed by the transferor servicer, or (ii) the department of the transferor servicer, that can be contacted by the borrower to answer inquiries relating to the transfer of servicing.

(D) The name and toll-free or collect call telephone number for (i) an individual employed by the transferee servicer, or (ii) the department of the transferee servicer, that can be contacted by the borrower to answer inquiries relating to the transfer of servicing.

(E) The date on which the transferor servicer who is servicing the mortgage loan before the assignment, sale, or transfer will cease to accept payments relating to the loan and the date on which the transferee servicer will begin to accept such payments.

(F) Any information concerning the effect the transfer may have, if any, on the terms of or the continued availability of mortgage life or disability insurance or any other type of optional insurance and what action, if any, the borrower must take to maintain coverage.

(G) A statement that the assignment, sale, or transfer of the servicing of the mortgage loan does not affect any term or condition of the security instruments other than terms directly related to the servicing of such loan.

(c) Notice by transferee of loan servicing at time of transfer

(1) Notice requirement

Each transferee servicer to whom the servicing of any federally related mortgage loan is assigned, sold, or transferred shall notify the borrower of any such assignment, sale, or transfer.

(2) Time of notice

(A) In general

Except as provided in subparagraphs (B) and (C), the notice required under paragraph (1) shall be made to the borrower not more than 15 days after the effective date of transfer of the servicing of the mortgage loan (with respect to which such notice is made).

(B) Exception for certain proceedings

The notice required under paragraph (1) shall be made to the borrower not more than 30 days after the effective date of assignment, sale, or transfer of the servicing of the mortgage loan (with respect to which such notice is made) in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by –

(i) termination of the contract for servicing the loan for cause;

(ii) commencement of proceedings for bankruptcy of the servicer; or

(iii) commencement of proceedings by the Federal Deposit Insurance Corporation or the Resolution Trust Corporation for conservatorship or

receivership of the servicer (or an entity by which the servicer is owned or controlled).

(C) Exception for notice provided at closing

The provisions of subparagraphs (A) and (B) shall not apply to any assignment, sale, or transfer of the servicing of any mortgage loan if the person who makes the loan provides to the borrower, at settlement (with respect to the property for which the mortgage loan is made), written notice under paragraph (3) of such transfer.

(3) Contents of notice

Any notice required under paragraph (1) shall include the information described in subsection (b)(3) of this section.

(d) Treatment of loan payments during transfer period

During the 60-day period beginning on the effective date of transfer of the servicing of any federally related mortgage loan, a late fee may not be imposed on the borrower with respect to any payment on such loan and no such payment may be treated as late for any other purposes, if the payment is received by the transferor servicer (rather than the transferee servicer who should properly receive payment) before the due date applicable to such payment.

(e) Duty of loan servicer to respond to borrower inquiries

(1) Notice of receipt of inquiry

(A) In general

If any servicer of a federally related mortgage loan receives a qualified written request from the borrower (or an agent of the borrower) for information relating to the servicing of such loan, the servicer shall provide a written response acknowledging receipt of the correspondence within 20 days (excluding legal public holidays, Saturdays, and

Sundays) unless the action requested is taken within such period.

(B) Qualified written request

For purposes of this subsection, a qualified written request shall be a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that –

(i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and

(ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

(2) Action with respect to inquiry

Not later than 60 days (excluding legal public holidays, Saturdays, and Sundays) after the receipt from any borrower of any qualified written request under paragraph (1) and, if applicable, before taking any action with respect to the inquiry of the borrower, the servicer shall –

(A) make appropriate corrections in the account of the borrower, including the crediting of any late charges or penalties, and transmit to the borrower a written notification of such correction (which shall include the name and telephone number of a representative of the servicer who can provide assistance to the borrower);

(B) after conducting an investigation, provide the borrower with a written explanation or clarification that includes –

(i) to the extent applicable, a statement of the reasons for which the servicer believes the account of the borrower is correct as determined by the servicer; and

(ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower; or

(C) after conducting an investigation, provide the borrower with a written explanation or clarification that includes –

(i) information requested by the borrower or an explanation of why the information requested is unavailable or cannot be obtained by the servicer; and

(ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower.

(3) Protection of credit rating

During the 60-day period beginning on the date of the servicer's receipt from any borrower of a qualified written request relating to a dispute regarding the borrower's payments, a servicer may not provide information regarding any overdue payment, owed by such borrower and relating to such period or qualified written request, to any consumer reporting agency (as such term is defined under section 1681a of title 15).

(f) Damages and costs

Whoever fails to comply with any provision of this section shall be liable to the borrower for each such failure in the following amounts:

(1) Individuals

In the case of any action by an individual, an amount equal to the sum of –

(A) any actual damages to the borrower as a result of the failure; and

(B) any additional damages, as the court may allow, in the case of a pattern or practice of non-

compliance with the requirements of this section, in an amount not to exceed $1,000.

(2) Class actions

In the case of a class action, an amount equal to the sum of –

(A) any actual damages to each of the borrowers in the class as a result of the failure; and

(B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not greater than $1,000 for each member of the class, except that the total amount of damages under this subparagraph in any class action may not exceed the lesser of –

(i) $500,000; or

(ii) 1 percent of the net worth of the servicer.

(3) Costs

In addition to the amounts under paragraph (1) or (2), in the case of any successful action under this section, the costs of the action, together with any attorneys fees incurred in connection with such action as the court may determine to be reasonable under the circumstances.

(4) Nonliability

A transferor or transferee servicer shall not be liable under this subsection for any failure to comply with any requirement under this section if, within 60 days after discovering an error (whether pursuant to a final written examination report or the servicer's own procedures) and before the commencement of an action under this subsection and the receipt of written notice of the error from the borrower, the servicer notifies the person concerned of the error and makes whatever adjustments are necessary in the appropriate account to ensure that the person will not be

required to pay an amount in excess of any amount that the person otherwise would have paid.

(g) Administration of escrow accounts

If the terms of any federally related mortgage loan require the borrower to make payments to the servicer of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer shall make payments from the escrow account for such taxes, insurance premiums, and other charges in a timely manner as such payments become due.

(h) Preemption of conflicting State laws

Notwithstanding any provision of any law or regulation of any State, a person who makes a federally related mortgage loan or a servicer shall be considered to have complied with the provisions of any such State law or regulation requiring notice to a borrower at the time of application for a loan or transfer of the servicing of a loan if such person or servicer complies with the requirements under this section regarding timing, content, and procedures for notification of the borrower.

(i) Definitions

For purposes of this section:

(1) Effective date of transfer

The term "effective date of transfer" means the date on which the mortgage payment of a borrower is first due to the transferee servicer of a mortgage loan pursuant to the assignment, sale, or transfer of the servicing of the mortgage loan.

(2) Servicer

The term "servicer" means the person responsible for servicing of a loan (including the person who makes or holds a loan if such person also services the loan). The term does not include –

(A) the Federal Deposit Insurance Corporation or the Resolution Trust Corporation, in connection with assets acquired, assigned, sold, or transferred pursuant to section 1823(c) of this title or as receiver or conservator of an insured depository institution; and

(B) the Government National Mortgage Association, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Resolution Trust Corporation, or the Federal Deposit Insurance Corporation, in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by –

(i) termination of the contract for servicing the loan for cause;

(ii) commencement of proceedings for bankruptcy of the servicer; or

(iii) commencement of proceedings by the Federal Deposit Insurance Corporation or the Resolution Trust Corporation for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

(3) Servicing

The term "servicing" means receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, including amounts for escrow accounts described in section 2609 of this title, and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan.

(j) Transition

(1) Originator liability

A person who makes a federally related mortgage loan shall not be liable to a borrower because of a failure of such person to comply with subsection (a) of

this section with respect to an application for a loan made by the borrower before the regulations referred to in paragraph (3) take effect.

(2) Servicer liability

A servicer of a federally related mortgage loan shall not be liable to a borrower because of a failure of the servicer to perform any duty under subsection (b), (c), (d), or (e) of this section that arises before the regulations referred to in paragraph (3) take effect.

(3) Regulations and effective date

The Secretary shall, by regulations that shall take effect not later than April 20, 1991, establish any requirements necessary to carry out this section. Such regulations shall include the model disclosure statement required under subsection (a)(2) of this section.

12 U.S.C. § 2607. Prohibition against kickbacks and unearned fees

(a) Business referrals

No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

(b) Splitting charges

No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

(c) Fees, salaries, compensation, or other payments

Nothing in this section shall be construed as prohibiting (1) the payment of a fee (A) to attorneys at law for services actually rendered or (B) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance or (C) by a lender to its duly appointed agent for services actually performed in the making of a loan, (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed, (3) payments pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and brokers, (4) affiliated business arrangements so long as (A) a disclosure is made of the existence of such arrangement to the person being referred and, in connection with such referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred (i) in the case of a face-to-face referral or a referral made in writing or by electronic media, at or before the time of the referral (and compliance with this requirement in such case may be evidenced by a notation in a written, electronic, or similar system of records maintained in the regular course of business); (ii) in the case of a referral made by telephone, within 3 business days after the referral by telephone, (and in such case an abbreviated verbal disclosure of the existence of the arrangement and the fact that a written disclosure will be provided within 3 business days shall be made to the person being referred during the telephone referral); or (iii) in the case of a referral by a lender (including a referral by a lender to an affiliated lender), at the time the estimates required under section 2604(c) of this title are provided (notwithstanding clause (i) or (ii)); and any required written receipt of such disclosure (without regard to the manner of the disclosure under clause (i), (ii), or (iii)) may be obtained at the closing or settlement (except that a person making a face-to-face referral who provides the

written disclosure at or before the time of the referral shall attempt to obtain any required written receipt of such disclosure at such time and if the person being referred chooses not to acknowledge the receipt of the disclosure at that time, that fact shall be noted in the written, electronic, or similar system of records maintained in the regular course of business by the person making the referral), (B) such person is not required to use any particular provider of settlement services, and (C) the only thing of value that is received from the arrangement, other than the payments permitted under this subsection, is a return on the ownership interest or franchise relationship, or (5) such other payments or classes of payments or other transfers as are specified in regulations prescribed by the Secretary, after consultation with the Attorney General, the Secretary of Veterans Affairs, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Secretary of Agriculture. For purposes of the preceding sentence, the following shall not be considered a violation of clause (4)(B): (i) any arrangement that requires a buyer, borrower, or seller to pay for the services of an attorney, credit reporting agency, or real estate appraiser chosen by the lender to represent the lender's interest in a real estate transaction, or (ii) any arrangement where an attorney or law firm represents a client in a real estate transaction and issues or arranges for the issuance of a policy of title insurance in the transaction directly as agent or through a separate corporate title insurance agency that may be established by that attorney or law firm and operated as an adjunct to his or its law practice.

(d) Penalties for violations; joint and several liability; treble damages; actions for injunction by Secretary and by State officials; costs and attorney fees; construction of State laws

(1) Any person or persons who violate the provisions of this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(2) Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.

(3) No person or persons shall be liable for a violation of the provisions of subsection (c)(4)(A) of this section if such person or persons proves by a preponderance of the evidence that such violation was not intentional and resulted from a bona fide error notwithstanding maintenance of procedures that are reasonably adapted to avoid such error.

(4) The Secretary, the Attorney General of any State, or the insurance commissioner of any State may bring an action to enjoin violations of this section.

(5) In any private action brought pursuant to this subsection, the court may award to the prevailing party the court costs of the action together with reasonable attorneys fees.

(6) No provision of State law or regulation that imposes more stringent limitations on affiliated business arrangements shall be construed as being inconsistent with this section.

12 U.S.C. § 2614. Jurisdiction of courts; limitations

Any action pursuant to the provisions of section 2605, 2607, or 2608 of this title may be brought in the United States district court or in any other court of competent jurisdiction, for the district in which the property involved is located, or where the violation is alleged to have occurred, within 3 years in the case of a violation of section 2605 of this title and 1 year in the case of a violation of section 2607 or 2608 of this title from the date of the occurrence of the violation, except that actions brought by the Secretary, the Attorney General of any State, or the insurance commissioner of any State may be brought within 3 years from the date of the occurrence of the violation.

12 U.S.C. § 2617. Authority of Secretary

(a) Issuance of regulations; exemptions

The Secretary is authorized to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of this chapter.

(b) Liability for acts done in good faith in conformity with rule, regulation, or interpretation

No provision of this chapter or the laws of any State imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Secretary or the Attorney General, notwithstanding that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(c) Investigations; hearings; failure to obey order; contempt

(1) The Secretary may investigate any facts, conditions, practices, or matters that may be deemed necessary or proper to aid in the enforcement of the provisions of this chapter, in prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning real estate settlement practices. To aid in the investigations, the Secretary is authorized to hold such hearings, administer such oaths, and require by subpena the attendance and testimony of such witnesses and production of such documents as the Secretary deems advisable.

(2) Any district court of the United States within the jurisdiction of which an inquiry is carried on may, in the case of contumacy or refusal to obey a subpena of the Secretary issued under this section, issue an order requiring compliance therewith; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(d) Delay of effectiveness of recent final regulation relating to payments to employees

(1) In general

The amendment to part 3500 of title 24 of the Code of Federal Regulations contained in the final regulation prescribed by the Secretary and published in the Federal Register on June 7, 1996, which will, as of the effective date of such amendment –

(A) eliminate the exemption for payments by an employer to employees of such employer for referral activities which is currently codified as section 3500.14(g)(1)(vii) of such title 24; and

(B) replace such exemption with a more limited exemption in new clauses (vii), (viii), and (ix) of section 3500.14 of such title 24,

shall not take effect before July 31, 1997.

(2) Continuation of prior rule

The regulation codified as section 3500.14(g)(1)(vii) of title 24 of the Code of Federal Regulations, relating to employer-employee payments, as in effect on May 1, 1996, shall remain in effect until the date the amendment referred to in paragraph (1) takes effect in accordance with such paragraph.

(3) Public notice of effective date

The Secretary shall provide public notice of the date on which the amendment referred to in paragraph (1) will take effect in accordance with such paragraph not less than 90 days and not more than 180 days before such effective date.

Regulatory Provisions

Regulation X, Part 3500 of Title 24 of the Code of Federal Regulations, provides in pertinent part as follows:

PART 3500–REAL ESTATE SETTLEMENT PROCEDURES ACT

24 C.F.R. § 3500.1 Designation.

This part may be referred to as Regulation X.

24 C.F.R. § 3500.2 Definitions.

(a) *Statutory terms.* All terms defined in RESPA (12 U.S.C. 2602) are used in accordance with their statutory meaning unless otherwise defined in paragraph (b) of this section or elsewhere in this part.

(b) *Other terms.* As used in this part:

Application means the submission of a borrower's financial information in anticipation of a credit decision, whether written or computer-generated, relating to a federally related mortgage loan. If the submission does not state or identify a specific property, the submission is an application for a pre-qualification and not an application for a federally related mortgage loan under this part. The subsequent addition of an identified property to the submission converts the submission to an application for a federally related mortgage loan.

Business day means a day on which the offices of the business entity are open to the public for carrying on substantially all of the entity's business functions.

Dealer means, in the case of property improvement loans, a seller, contractor, or supplier of goods or services. In the case of manufactured home loans, "dealer" means one who engages in the business of manufactured home retail sales.

Dealer loan or dealer consumer credit contract means, generally, any arrangement in which a dealer assists the borrower in obtaining a federally related mortgage loan from the funding lender and then assigns the dealer's legal interests to the funding lender and receives the net proceeds of the loan. The funding lender is the lender for the purposes of the disclosure requirements of this part. If a dealer is a "creditor" as defined under the definition of "federally related mortgage loan" in this part, the dealer is the lender for purposes of this part.

Effective date of transfer is defined in section 6(i)(1) of RESPA (12 U.S.C. 2605(i)(1)). In the case of a home equity conversion mortgage or reverse mortgage as referenced in this section, the effective date of transfer is the transfer date agreed upon by the transferee servicer and the transferor servicer.

Federally related mortgage loan or *mortgage loan* means as follows:

(1) Any loan (other than temporary financing, such as a construction loan):

(i) That is secured by a first or subordinate lien on residential real property, including a refinancing of any secured loan on residential real property upon which there is either:

(A) Located or, following settlement, will be constructed using proceeds of the loan, a structure or structures designed principally for occupancy of from one to four families (including individual units of condominiums and cooperatives and including any related interests, such as a share in the cooperative or right to occupancy of the unit); or

(B) Located or, following settlement, will be placed using proceeds of the loan, a manufactured home; and

(ii) For which one of the following paragraphs applies. The loan:

(A) Is made in whole or in part by any lender that is either regulated by or whose deposits or accounts are insured by any agency of the Federal Government;

(B) Is made in whole or in part, or is insured, guaranteed, supplemented, or assisted in any way:

(*1*) By the Secretary or any other officer or agency of the Federal Government; or

(*2*) Under or in connection with a housing or urban development program administered by the Secretary or a housing or related program administered by any other officer or agency of the Federal Government;

(C) Is intended to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation (or its successors), or a financial institution from which the loan is to be purchased by the Federal Home Loan Mortgage Corporation (or its successors);

(D) Is made in whole or in part by a "creditor", as defined in section 103(f) of the Consumer Credit Protection Act (15 U.S.C. 1602(f)), that makes or invests in residential real estate loans aggregating more than $1,000,000 per year. For purposes of this definition, the term "creditor" does not include any agency or instrumentality of any State, and the term "residential real estate loan" means any loan secured by residential real property, including single-family and multifamily residential property;

(E) Is originated either by a dealer or, if the obligation is to be assigned to any maker of mortgage loans specified in paragraphs (1)(ii)(A) through (D) of this definition, by a mortgage broker; or

(F) Is the subject of a home equity conversion mortgage, also frequently called a "reverse mortgage," issued by any maker of mortgage loans specified in paragraphs (1)(ii) (A) through (D) of this definition.

(2) Any installment sales contract, land contract, or contract for deed on otherwise qualifying residential property is a federally related mortgage loan if the contract is funded in whole or in part by proceeds of a loan made by any maker of mortgage loans specified in paragraphs (1)(ii) (A) through (D) of this definition.

(3) If the residential real property securing a mortgage loan is not located in a State, the loan is not a federally related mortgage loan.

Good faith estimate means an estimate, prepared in accordance with section 5 of RESPA (12 U.S.C. 2604), of charges that a borrower is likely to incur in connection with a settlement.

HUD-1 or HUD-1A settlement statement (also *HUD-1* or *HUD-1A*) means the statement that is prescribed by the Secretary in this part for setting forth settlement charges in connection with either the purchase or the refinancing (or other subordinate lien transaction) of 1- to 4-family residential property.

Lender means, generally, the secured creditor or creditors named in the debt obligation and document creating the lien. For loans originated by a mortgage broker that closes a federally related mortgage loan in its own name in a table funding transaction, the lender is the person to whom the obligation is initially assigned at or after settlement. A lender, in connection with dealer loans, is the lender to whom the loan is assigned, unless the dealer meets the definition of creditor as defined under "federally related mortgage loan" in this section. See also § 3500.5(b)(7), secondary market transactions.

Managerial employee means an employee of a settlement service provider who does not routinely deal directly with consumers, and who either hires, directs, assigns, promotes, or rewards other employees or independent contractors, or is in a position to formulate, determine, or influence the policies of the employer. Neither the term "managerial employee" nor the term "employee" includes independent contractors, but a

managerial employee may hold a real estate brokerage or agency license.

Manufactured home is defined in § 3280.2 of this title.

Mortgage broker means a person (not an employee or exclusive agent of a lender) who brings a borrower and lender together to obtain a federally related mortgage loan, and who renders services as described in the definition of "settlement services" in this section. A loan correspondent approved under § 202.8 of this title for Federal Housing Administration programs is a mortgage broker for purposes of this part.

Mortgaged property means the real property that is security for the federally related mortgage loan.

Person is defined in section 3(5) of RESPA (12 U.S.C. 2602(5)).

Public Guidance Documents means documents that HUD has published in the FEDERAL REGISTER, and that it may amend from time-to-time by publication in the FEDERAL REGISTER. These documents are also available from HUD at the address indicated in 24 CFR 3500.3.

Refinancing means a transaction in which an existing obligation that was subject to a secured lien on residential real property is satisfied and replaced by a new obligation undertaken by the same borrower and with the same or a new lender. The following shall not be treated as a refinancing, even when the existing obligation is satisfied and replaced by a new obligation with the same lender (this definition of "refinancing" as to transactions with the same lender is similar to Regulation Z, 12 CFR 226.20(a)):

(1) A renewal of a single payment obligation with no change in the original terms;

(2) A reduction in the annual percentage rate as computed under the Truth in Lending Act with a corresponding change in the payment schedule;

(3) An agreement involving a court proceeding;

(4) A workout agreement, in which a change in the payment schedule or change in collateral requirements is agreed to as a result of the consumer's default or delinquency, unless the rate is increased or the new amount financed exceeds the unpaid balance plus earned finance charges and premiums for continuation of allowable insurance; and

(5) The renewal of optional insurance purchased by the consumer that is added to an existing transaction, if disclosures relating to the initial purchase were provided.

Regulation Z means the regulations issued by the Board of Governors of the Federal Reserve System (12 CFR part 226) to implement the Federal Truth in Lending Act (15 U.S.C. 1601 *et seq.*), and includes the Commentary on Regulation Z.

Required use means a situation in which a person must use a particular provider of a settlement service in order to have access to some distinct service or property, and the person will pay for the settlement service of the particular provider or will pay a charge attributable, in whole or in part, to the settlement service. However, the offering of a package (or combination of settlement services) or the offering of discounts or rebates to consumers for the purchase of multiple settlement services does not constitute a required use. Any package or discount must be optional to the purchaser. The discount must be a true discount below the prices that are otherwise generally available, and must not be made up by higher costs elsewhere in the settlement process.

RESPA means the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. 2601 *et seq.*

Servicer means the person responsible for the servicing of a mortgage loan (including the person who makes or holds a mortgage loan if such person also services the mortgage loan). The term does not include:

(1) The Federal Deposit Insurance Corporation (FDIC) or the Resolution Trust Corporation (RTC), in connec-

tion with assets acquired, assigned, sold, or transferred pursuant to section 13(c) of the Federal Deposit Insurance Act or as receiver or conservator of an insured depository institution; and

(2) The Federal National Mortgage Corporation (FNMA); the Federal Home Loan Mortgage Corporation (Freddie Mac); the RTC; the FDIC; HUD, including the Government National Mortgage Association (GNMA) and the Federal Housing Administration (FHA) (including cases in which a mortgage insured under the National Housing Act (12 U.S.C. 1701 *et seq.*) is assigned to HUD); the National Credit Union Administration (NCUA); the Farmers Home Administration or its successor agency under Public Law 103-354 (FmHA); and the Department of Veterans Affairs (VA), in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by termination of the contract for servicing the loan for cause, commencement of proceedings for bankruptcy of the servicer, or commencement of proceedings by the FDIC or RTC for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

Servicing means receiving any scheduled periodic payments from a borrower pursuant to the terms of any mortgage loan, including amounts for escrow accounts under section 10 of RESPA (12 U.S.C. 2609), and making the payments to the owner of the loan or other third parties of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the mortgage servicing loan documents or servicing contract. In the case of a home equity conversion mortgage or reverse mortgage as referenced in this section, servicing includes making payments to the borrower.

Settlement means the process of executing legally binding documents regarding a lien on property that is subject to a federally related mortgage loan. This process may also be called "closing" or "escrow" in different jurisdictions.

Settlement service means any service provided in connection with a prospective or actual settlement, including, but not limited to, any one or more of the following:

(1) Origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of such loans);

(2) Rendering of services by a mortgage broker (including counseling, taking of applications, obtaining verifications and appraisals, and other loan processing and origination services, and communicating with the borrower and lender);

(3) Provision of any services related to the origination, processing or funding of a federally related mortgage loan;

(4) Provision of title services, including title searches, title examinations, abstract preparation, insurability determinations, and the issuance of title commitments and title insurance policies;

(5) Rendering of services by an attorney;

(6) Preparation of documents, including notarization, delivery, and recordation;

(7) Rendering of credit reports and appraisals;

(8) Rendering of inspections, including inspections required by applicable law or any inspections required by the sales contract or mortgage documents prior to transfer of title;

(9) Conducting of settlement by a settlement agent and any related services;

(10) Provision of services involving mortgage insurance;

(11) Provision of services involving hazard, flood, or other casualty insurance or homeowner's warranties;

(12) Provision of services involving mortgage life, disability, or similar insurance designed to pay a

mortgage loan upon disability or death of a borrower, but only if such insurance is required by the lender as a condition of the loan;

(13) Provision of services involving real property taxes or any other assessments or charges on the real property;

(14) Rendering of services by a real estate agent or real estate broker; and

(15) Provision of any other services for which a settlement service provider requires a borrower or seller to pay.

Special information booklet means the booklet prepared by the Secretary pursuant to section 5 of RESPA (12 U.S.C. 2604) to help persons understand the nature and costs of settlement services. The Secretary publishes the form of the special information booklet in the FEDERAL REGISTER. The Secretary may issue or approve additional booklets or alternative booklets by publication of a Notice in the FEDERAL REGISTER.

State means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

Table funding means a settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds. A table-funded transaction is not a secondary market transaction (see § 3500.5(b)(7)).

Title company means any institution, or its duly authorized agent, that is qualified to issue title insurance.

24 C.F.R. § 3500.4 Reliance upon rule, regulation or interpretation by HUD.

(a) *Rule, regulation or interpretation.* (1) For purposes of sections 19(a) and (b) of RESPA (12 U.S.C. 2617(a) and (b)) only the following constitute a rule, regulation or interpretation of the Secretary:

(i) All provisions, including appendices, of this part. Any other document referred to in this part is not incorporated in this part unless it is specifically set out in this part;

(ii) Any other document that is published in the FEDERAL REGISTER by the Secretary and states that it is an "interpretation," "interpretive rule," "commentary," or a "statement of policy" for purposes of section 19(a) of RESPA. Such documents will be prepared by HUD staff and counsel. Such documents may be revoked or amended by a subsequent document published in the FEDERAL REGISTER by the Secretary.

(2) A "rule, regulation, or interpretation thereof by the Secretary" for purposes of section 19(b) of RESPA (12 U.S.C. 2617(b)) shall not include the special information booklet prescribed by the Secretary or any other statement or issuance, whether oral or written, by an officer or representative of the Department of Housing and Urban Development (HUD), letter or memorandum by the Secretary, General Counsel, any Assistant Secretary or other officer or employee of HUD, preamble to a regulation or other issuance of HUD, Public Guidance Document, report to Congress, pleading, affidavit or other document in litigation, pamphlet, handbook, guide, telegraphic communication, explanation, instructions to forms, speech or other material of any nature which is not specifically included in paragraph (a)(1) of this section.

(b) *Unofficial interpretations; staff discretion.* In response to requests for interpretation of matters not adequately covered by this part or by an official interpretation issued under paragraph (a)(1)(ii) of this section, unofficial staff interpretations may be provided at the discretion of HUD staff or counsel. Written requests for such interpretations should be directed to the address indicated in § 3500.3. Such interpretations provide no protection under section 19(b) of RESPA (12 U.S.C. 2617(b)). Ordinarily, staff or counsel will not issue unofficial interpretations on matters adequately

covered by this part or by official interpretations or commentaries issued under paragraph (a)(1)(ii) of this section.

(c) All informal counsel's opinions and staff interpretations issued before November 2, 1992, were withdrawn as of that date. Courts and administrative agencies, however, may use previous opinions to determine the validity of conduct under the previous Regulation X.

24 C.F.R. § 3500.5 Coverage of RESPA.

(a) *Applicability.* RESPA and this part apply to all federally related mortgage loans, except for the exemptions provided in paragraph (b) of this section.

(b) *Exemptions.* (1) A loan on property of 25 acres or more.

(2) *Business purpose loans.* An extension of credit primarily for a business, commercial, or agricultural purpose, as defined by Regulation Z, 12 CFR 226.3(a)(1). Persons may rely on Regulation Z in determining whether the exemption applies.

(3) *Temporary financing.* Temporary financing, such as a construction loan. The exemption for temporary financing does not apply to a loan made to finance construction of 1- to 4-family residential property if the loan is used as, or may be converted to, permanent financing by the same lender or is used to finance transfer of title to the first user. If a lender issues a commitment for permanent financing, with or without conditions, the loan is covered by this part. Any construction loan for new or rehabilitated 1- to 4-family residential property, other than a loan to a bona fide builder (a person who regularly constructs 1- to 4-family residential structures for sale or lease), is subject to this part if its term is for two years or more. A "bridge loan" or "swing loan" in which a lender takes a security interest in otherwise covered 1- to 4- family residential property is not covered by RESPA and this part.

(4) *Vacant land.* Any loan secured by vacant or unimproved property, unless within two years from the date of the settlement of the loan, a structure or a manufactured home will be constructed or placed on the real property using the loan proceeds. If a loan for a structure or manufactured home to be placed on vacant or unimproved property will be secured by a lien on that property, the transaction is covered by this part.

(5) *Assumption without lender approval.* Any assumption in which the lender does not have the right expressly to approve a subsequent person as the borrower on an existing federally related mortgage loan. Any assumption in which the lender's permission is both required and obtained is covered by RESPA and this part, whether or not the lender charges a fee for the assumption.

(6) *Loan conversions.* Any conversion of a federally related mortgage loan to different terms that are consistent with provisions of the original mortgage instrument, as long as a new note is not required, even if the lender charges an additional fee for the conversion.

(7) *Secondary market transactions.* A *bona fide* transfer of a loan obligation in the secondary market is not covered by RESPA and this part, except as set forth in section 6 of RESPA (12 U.S.C. 2605) and § 3500.21. In determining what constitutes a *bona fide* transfer, HUD will consider the real source of funding and the real interest of the funding lender. Mortgage broker transactions that are table-funded are not secondary market transactions. Neither the creation of a dealer loan or dealer consumer credit contract, nor the first assignment of such loan or contract to a lender, is a secondary market transaction (see § 3500.2.)

24 C.F.R. § 3500.8 Use of HUD-1 or HUD-1A settlement statements.

(a) *Use by settlement agent.* The settlement agent shall use the HUD-1 settlement statement in every settlement involving a federally related mortgage loan in which there is a borrower and a seller. For transactions in which there is a borrower and no seller, such as refinancing loans or subordinate lien loans, the HUD-1 may be utilized by using the borrower's side of the HUD-1 statement. Alternatively, the form HUD-1A may be used for these transactions. Either the HUD-1 or the HUD-1A, as appropriate, shall be used for every RESPA-covered transaction, unless its use is specifically exempted, but the HUD-1 or HUD-1A may be modified as permitted under this part. The use of the HUD-1 or HUD-1A is exempted for open-end lines of credit (home-equity plans) covered by the Truth in Lending Act and Regulation Z.

(b) *Charges to be stated.* The settlement agent shall complete the HUD-1 or HUD-1A in accordance with the instructions set forth in appendix A to this part.

(c) *Aggregate accounting at settlement.* (1) After itemizing individual deposits in the 1000 series using single- item accounting, the servicer shall make an adjustment based on aggregate accounting. This adjustment equals the difference in the deposit required under aggregate accounting and the sum of the deposits required under single-item accounting. The computation steps for both accounting methods are set out in § 3500.17(d). The adjustment will always be a negative number or zero (-0-). The settlement agent shall enter the aggregate adjustment amount on a final line in the 1000 series of the HUD-1 or HUD-1A statement.

(2) During the phase-in period, as defined in § 3500.17(b), an alternative procedure is available. The settlement agent may initially calculate the 1000 series deposits for the HUD-1 and HUD-1A settlement statement using single-item analysis with only a one-month

cushion (unless the mortgage loan documents indicate a smaller amount). In the escrow account analysis conducted within 45 days of settlement, however, the servicer shall adjust the escrow account to reflect the aggregate accounting balance. Appendix E to this part sets out examples of aggregate analysis. Appendix A to this part contains instructions for completing the HUD-1 or HUD-1A settlement statements using an aggregate analysis adjustment and the alternative process during the phase-in period.

24 C.F.R. § 3500.14 Prohibition against kickbacks and unearned fees.

(a) *Section 8 violation.* Any violation of this section is a violation of section 8 of RESPA (12 U.S.C. 2607) and is subject to enforcement as such under § 3500.19.

(b) *No referral fees.* No person shall give and no person shall accept any fee, kickback or other thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or part of a settlement service involving a federally related mortgage loan shall be referred to any person. Any referral of a settlement service is not a compensable service, except as set forth in § 3500.14(g)(1). A company may not pay any other company or the employees of any other company for the referral of settlement service business.

(c) *No split of charges except for actual services performed.* No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed. A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section. The source of the payment does not determine whether or not a service is compensable. Nor may the prohibi-

tions of this part be avoided by creating an arrangement wherein the purchaser of services splits the fee.

(d) *Thing of value.* This term is broadly defined in section 3(2) of RESPA (12 U.S.C. 2602(2)). It includes, without limitation, monies, things, discounts, salaries, commissions, fees, duplicate payments of a charge, stock, dividends, distributions of partnership profits, franchise royalties, credits representing monies that may be paid at a future date, the opportunity to participate in a money-making program, retained or increased earnings, increased equity in a parent or subsidiary entity, special bank deposits or accounts, special or unusual banking terms, services of all types at special or free rates, sales or rentals at special prices or rates, lease or rental payments based in whole or in part on the amount of business referred, trips and payment of another person's expenses, or reduction in credit against an existing obligation. The term "payment" is used throughout §§ 3500.14 and 3500.15 as synonymous with the giving or receiving any "thing of value" and does not require transfer of money.

(e) *Agreement or understanding.* An agreement or understanding for the referral of business incident to or part of a settlement service need not be written or verbalized but may be established by a practice, pattern or course of conduct. When a thing of value is received repeatedly and is connected in any way with the volume or value of the business referred, the receipt of the thing of value is evidence that it is made pursuant to an agreement or understanding for the referral of business.

(f) *Referral.* (1) A referral includes any oral or written action directed to a person which has the effect of affirmatively influencing the selection by any person of a provider of a settlement service or business incident to or part of a settlement service when such person will pay for such settlement service or business incident thereto or pay a charge attributable in whole or in part to such settlement service or business.

(2) A referral also occurs whenever a person paying for a settlement service or business incident thereto is required to use (see § 3500.2, "required use") a particular provider of a settlement service or business incident thereto.

(g) *Fees, salaries, compensation, or other payments.* (1) Section 8 of RESPA permits:

(i) A payment to an attorney at law for services actually rendered;

(ii) A payment by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance;

(iii) A payment by a lender to its duly appointed agent or contractor for services actually performed in the origination, processing, or funding of a loan;

(iv) A payment to any person of a *bona fide* salary or compensation or other payment for goods or facilities actually furnished or for services actually performed;

(v) A payment pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and real estate brokers. (The statutory exemption restated in this paragraph refers only to fee divisions within real estate brokerage arrangements when all parties are acting in a real estate brokerage capacity, and has no applicability to any fee arrangements between real estate brokers and mortgage brokers or between mortgage brokers.);

(vi) Normal promotional and educational activities that are not conditioned on the referral of business and that do not involve the defraying of expenses that otherwise would be incurred by persons in a position to refer settlement services or business incident thereto; or

(vii) An employer's payment to its own employees for any referral activities.

(2) The Department may investigate high prices to see if they are the result of a referral fee or a split of a fee.

If the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods actually performed or provided. These facts may be used as evidence of a violation of section 8 and may serve as a basis for a RESPA investigation. High prices standing alone are not proof of a RESPA violation. The value of a referral (i.e., the value of any additional business obtained thereby) is not to be taken into account in determining whether the payment exceeds the reasonable value of such goods, facilities or services. The fact that the transfer of the thing of value does not result in an increase in any charge made by the person giving the thing of value is irrelevant in determining whether the act is prohibited.

(3) *Multiple services.* When a person in a position to refer settlement service business, such as an attorney, mortgage lender, real estate broker or agent, or developer or builder, receives a payment for providing additional settlement services as part of a real estate transaction, such payment must be for services that are actual, necessary and distinct from the primary services provided by such person. For example, for an attorney of the buyer or seller to receive compensation as a title agent, the attorney must perform core title agent services (for which liability arises) separate from attorney services, including the evaluation of the title search to determine the insurability of the title, the clearance of underwriting objections, the actual issuance of the policy or policies on behalf of the title insurance company, and, where customary, issuance of the title commitment, and the conducting of the title search and closing.

(h) *Recordkeeping.* Any documents provided pursuant to this section shall be retained for five (5) years from the date of execution.

(i) *Appendix B of this part.* Illustrations in appendix B of this part demonstrate some of the requirements of this section.

EFFECTIVE DATE NOTE: At 61 FR 29252, June 7, 1996, § 3500.14 was amended by revising the last sentence of paragraph (b), the heading of paragraph (g), and paragraph (g)(1), effective Oct. 7, 1996. At 61 FR 51782, Oct. 4, 1996, the effective date was delayed until further notice. For the convenience of the user, the new text is set forth as follows:

§ 3500.14 Prohibition against kickbacks and unearned fees.

* * * * *

(b) * * * A business entity (whether or not in an affiliate relationship) may not pay any other business entity or the employees of any other business entity for the referral of settlement service business.

* * * * *

(g) *Exemptions for fees, salaries, compensation, or other payments.* (1) The following are permissible:

(i) A payment to an attorney at law for services actually rendered;

(ii) A payment by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance;

(iii) A payment by a lender to its duly appointed agent or contractor for services actually performed in the origination, processing, or funding of a loan;

(iv) A payment to any person of a *bona fide* salary or compensation or other payment for goods or facilities actually furnished or for services actually performed;

(v) A payment pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and real estate brokers. (The statutory exemption restated in this paragraph refers only to fee divisions within real estate brokerage arrangements when all parties are acting in a real estate brokerage capacity, and has no applicability to any fee

arrangements between real estate brokers and mortgage brokers or between mortgage brokers.)

(vi) Normal promotional and educational activities that are not conditioned on the referral of business and do not involve the defraying of expenses that otherwise would be incurred by persons in a position to refer settlement services or business incident thereto;

(vii) A payment by an employer to its own *bona fide* employee for generating business for that employer;

(viii) In a controlled business arrangement, a payment by an employer of a bonus to a managerial employee based on criteria relating to performance (such as profitability, capture rate, or other thresholds) of a business entity in the controlled business arrangement. However, the amount of such bonus may not be calculated as a multiple of the number or value of referrals of settlement service business to a business entity in a controlled business arrangement; and

(ix)(A) A payment by an employer to its *bona fide* employee for the referral of settlement service business to a settlement service provider that has an affiliate relationship with the employer or in which the employer has a direct or beneficial ownership interest of more than 1 percent, if the following conditions are met:

(*1*) The employee does not perform settlement services in any transaction; and

(*2*) Before the referral, the employee provides to the person being referred a written disclosure in the format of the Controlled Business Arrangement Disclosure Statement, set forth in appendix D to this part.

(B) For purposes of this paragraph (g)(1)(ix), the marketing of a settlement service or product of an affiliated entity, including the collection and conveyance of information or the taking of an application or order for an affiliated entity, does not constitute the performance of a settlement service. Under this paragraph (g)(1)(ix), marketing of a settlement service or product may include incidental communications with the consumer after the application or order, such as providing the

consumer with information about the status of an application or order; marketing shall not include serving as the ongoing point of contact for coordinating the delivery and provision of settlement services.

* * * * *

24 C.F.R. § 3500.19 Enforcement.

(a) *Enforcement policy.* It is the policy of the Secretary regarding RESPA enforcement matters to cooperate with Federal, State or local agencies having supervisory powers over lenders or other persons with responsibilities under RESPA. Federal agencies with supervisory powers over lenders may use their powers to require compliance with RESPA. In addition, failure to comply with RESPA may be grounds for administrative action by the Secretary under part 24 of this title concerning debarment, suspension, ineligibility of contractors and grantees, or under part 25 of this title concerning the HUD Mortgagee Review Board. Nothing in this paragraph is a limitation on any other form of enforcement which may be legally available.

(b) *Violations of section 8 of RESPA (12 U.S.C. 2607), § 3500.14, or § 3500.15.* Any person who violates §§ 3500.14 or 3500.15 shall be deemed to violate section 8 of RESPA and shall be sanctioned accordingly.

(c) *Violations of section 9 of RESPA (12 U.S.C. 2608) or § 3500.16.* Any person who violates section 3500.16 of this part shall be deemed to violate section 9 of RESPA and shall be sanctioned accordingly.

(d) *Investigations.* The procedures for investigations and investigational proceedings are set forth in 24 CFR part 3800.

Federal Rules of Civil Procedure

Federal Rule of Civil Procedure 23 provides:

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members,

and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class

action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Banc One Mortgage Corporation

BANK ONE.
1600 E. Northern Ave., #200
Phoenix, AZ 85020 800-645-0334
PHONE REGISTRATION/LOCK-IN 1-800-355-7994
REGISTRATION BY FAX: (317) 321-4424

Wholesale/Correspondent Pricing 1/5/98

Conforming Pricing

Maximum Conforming Loan Amount $227,150

30 YEAR FIXED - PROGRAM 01				CONFORMING
RATE	15 DAYS	30 DAYS	45 DAYS	60 DAYS
8.000%	103.000	102.875	102.750	102.625
7.875%	103.000	102.875	102.750	102.625
7.750%	102.875	102.750	102.625	102.500
7.625%	102.625	102.500	102.375	102.250
7.500%	102.375	102.250	102.125	102.000
7.375%	101.875	101.875	101.750	101.625
7.250%	101.500	101.375	101.250	101.125
7.125%	101.000	100.875	100.750	100.625
7.000%	100.500	100.375	100.250	100.125
6.875%	99.875	99.750	99.625	99.500

LOAN AMOUNTS FROM $175,000 - $227,150 Improve .375
LOAN AMOUNTS FROM $100,000 - $174,999 Improve .125
LOAN AMOUNTS BELOW $49,999 Subtract .750
Subtract .625 From 45 day Price for 90 Day Lock In
INVESTMENT (N/O/O) SUBTRACT 1.50 FROM PRICE
Subtract 2.500 for Lender Funded Buydowns

7/23 BALLOON - PROGRAM 07				CONFORMING
RATE	15 DAYS	30 DAYS	45 DAYS	60 DAYS
8.375%	102.375	102.250	102.250	102.125
8.250%	102.375	102.250	102.250	102.125
8.125%	102.375	102.250	102.250	102.125
8.000%	102.375	102.250	102.250	102.125
7.875%	102.250	102.125	102.125	102.000
7.750%	102.125	102.000	102.000	101.875
7.625%	102.000	101.875	101.875	101.750
7.500%	101.875	101.750	101.750	101.625
7.375%	101.375	101.250	101.250	101.125

LOAN AMOUNTS FROM $100,000 - $227,150 Improve .125
LOAN AMOUNTS BELOW $49,999 Subtract .750
Subtract .125 for Loans with LTV's over 80%

30 YEAR FHA - PROGRAM 61				
RATE	15 DAYS	30 DAYS	45 DAYS	60 DAYS
8.000%	103.500	103.375	103.250	103.250
7.875%	103.500	103.375	103.250	103.250
7.750%	103.000	102.875	102.750	102.750
7.625%	102.750	102.625	102.500	102.500
7.500%	102.625	102.500	102.375	102.375
7.375%	101.500	101.375	101.250	101.250
7.250%	101.000	100.875	100.750	100.750
7.125%	100.875	100.750	100.625	100.625

LOAN AMOUNTS BELOW $49,999 Subtract .750
2/1 Buydown Subtract .750
Lender Funded Buydown Subtract 3.250

Program 42B - 1/1 ARM Non-Convertible 2.75% Margin			
Rate	15 Days	45 Days	60 Days
6.625%	101.375	101.250	101.125
6.500%	101.250	101.125	101.000
6.375%	101.125	101.000	100.875
6.250%	101.000	100.875	100.750
6.125%	100.750	100.625	100.500
6.000%	100.500	100.375	100.250
5.875%	100.250	100.125	100.000

LOAN AMOUNTS BELOW $49,999 Subtract .750

Program 52B - 5/1 ARM Non-Convertible 2.75% Margin			
Rate	15 Days	45 Days	60 Days
7.750%	101.875	101.750	101.625
7.625%	101.750	101.625	101.500
7.500%	101.500	101.375	101.250
7.375%	101.125	101.000	100.875
7.250%	100.750	100.625	100.500
7.125%	100.375	100.250	100.125
7.000%	100.000	99.875	99.750

LOAN AMOUNTS BELOW $49,999 Subtract .750

Program 09 - Bank One Affordable Dream Mortgage				
RATE	15 DAYS	30 DAYS	45 DAYS	60 DAYS
7.625%	101.875	101.875	101.875	101.750
7.500%	101.875	101.875	101.875	101.750
7.375%	101.875	101.875	101.750	101.625
7.250%	101.500	101.375	101.250	101.125

LOAN AMOUNTS FROM $175,000 - $214,600 Improve .375
LOAN AMOUNTS FROM $100,000 - $174,999 Improve .125
LOAN AMOUNTS BELOW $49,999 Subtract .750

15 YEAR FIXED - PROGRAM 04				CONFORMING
RATE	15 DAYS	30 DAYS	45 DAYS	60 DAYS
7.750%	102.500	102.375	102.375	102.250
7.625%	102.500	102.375	102.375	102.250
7.500%	102.500	102.375	102.375	102.250
7.375%	102.250	102.125	102.125	102.000
7.250%	102.000	101.875	101.875	101.750
7.125%	101.750	101.625	101.625	101.500
7.000%	101.500	101.375	101.375	101.250
6.875%	101.125	101.000	101.000	100.875
6.750%	100.625	100.500	100.500	100.375

LOAN AMOUNTS FROM $175,000 - $227,150 Improve .500
LOAN AMOUNTS FROM $100,000 - $174,999 Improve .250
LOAN AMOUNTS BELOW $49,999 Subtract .750
Subtract .625 From 45 day Price for 90 Day Lock In
INVESTMENT (N/O/O) SUBTRACT 1.50 FROM PRICE
Subtract 2.500 for Lender Funded Buydowns

5/25 BALLOON - PROGRAM 08				CONFORMING
RATE	15 DAYS	30 DAYS	45 DAYS	60 DAYS
8.000%	102.000	102.000	101.875	101.750
7.875%	101.750	101.750	101.625	101.500
7.750%	101.625	101.625	101.500	101.375
7.625%	101.500	101.500	101.375	101.250
7.500%	101.375	101.375	101.250	101.125
7.375%	101.125	101.125	101.000	100.875
7.250%	101.000	101.000	100.875	100.750
7.125%	100.875	100.875	100.750	100.625
7.000%	100.625	100.625	100.500	100.375
6.875%	100.250	100.250	100.125	100.000

LOAN AMOUNTS FROM $100,000 - $227,150 Improve .125
LOAN AMOUNTS BELOW $49,999 Subtract .750

15 YEAR FHA - PROGRAM 65				
RATE	15 DAYS	30 DAYS	45 DAYS	60 DAYS
7.500%	103.000	102.875	102.750	102.750
7.000%	101.750	101.625	101.500	101.500
6.500%	100.000	99.875	99.750	99.750

LOAN AMOUNTS BELOW $49,999 Subtract .750
2/1 Buydown Subtract .750
Lender Funded Buydown Subtract 3.250

FHA ARM - PROGRAM 64				2.750% Margin
6.500%	101.375	101.375	101.500	101.375
6.250%	100.875	100.875	101.000	100.875
6.000%	100.500	100.500	100.625	100.500

LOAN AMOUNTS BELOW $49,999 Subtract .750

Program 51B - 3/1 ARM Non-Convertible 2.75% Margin			
Rate	15 Days	45 Days	60 Days
7.500%	101.750	101.625	101.500
7.375%	101.625	101.500	101.375
7.250%	101.375	101.250	101.125
7.125%	101.125	101.000	100.875
7.000%	100.875	100.750	100.625
6.875%	100.625	100.500	100.375
6.750%	100.375	100.250	100.125

LOAN AMOUNTS BELOW $49,999 Subtract .750

Program 53B - 7/1 ARM Non-Convertible 2.75% Margin			
Rate	15 Days	45 Days	60 Days
7.750%	102.125	102.000	101.875
7.625%	101.875	101.750	101.625
7.500%	101.625	101.500	101.375
7.375%	101.250	101.125	101.000
7.250%	100.875	100.750	100.625
7.125%	100.500	100.375	100.250
7.000%	100.125	100.000	99.875

LOAN AMOUNTS BELOW $49,999 Subtract .750

Prog. 70 1/1 Construction/Perm ARM	
Rate	45 Days
8.000	101.000
7.500	100.000

* 100.500 to be paid at closing / .500 to be paid at Modification

Prog. 72 3/1 Construction/Perm ARM	
Rate	45 Days
8.000	101.000
7.500	100.000

* 100.500 to be paid at closing / .500 to be paid at Modification

Comments:

Check Out Our Special Pricing Bonuses For Conforming Fixed Rate Products and New Improved Escrow Fee Guidelines.

RATES & TERMS SUBJECT TO CHANGE W/OUT NOTICE *FOR USE BY BOMC APPROVED BROKERS ONLY *NO PUBLIC DISTRIBUTION

BEST AVAILABLE COPY

Banc One Mortgage Corporation

BANK ONE
1600 E. Northern Ave., #200
Phoenix, AZ 85020 800-645-0334
PHONE REGISTRATION/LOCK-IN 1-800-355-7994
REGISTRATION BY FAX: (317) 321-4424

Wholesale/Correspondent Pricing: US/98

Jumbo Pricing

Banc One Jumbo 30yr. Fixed - Program 45B

Rate	15 Day	30 DAY	45 DAY	60 DAY
8.000	102.250	102.125	102.000	101.750
7.875	102.000	101.875	101.750	101.500
7.750	101.750	101.625	101.500	101.250
7.625	101.375	101.250	101.125	100.875
7.500	101.000	100.875	100.750	100.500
7.375	100.625	100.500	100.375	100.125
7.250	100.250	100.125	100.000	99.750

Banc One Jumbo 15yr. Fixed - Program 46B

Rate	15 Day	30 DAY	45 DAY	60 DAY
8.000	102.375	102.250	102.125	101.875
7.875	102.125	102.000	101.875	101.625
7.750	101.875	101.750	101.625	101.375
7.625	101.625	101.500	101.375	101.125
7.500	101.375	101.250	101.125	100.875
7.375	101.125	101.000	100.875	100.625
7.250	100.875	100.750	100.625	100.375
7.125	100.500	100.375	100.250	100.000

Jumbo 30yr. Fixed - Program 45G

Rate	15 Day	30 DAY	45 DAY	60 DAY
7.500	101.250	101.125	101.000	100.875
7.375	100.875	100.750	100.625	100.500
7.250	100.375	100.250	100.125	100.000
7.125	99.750	99.625	99.500	99.375
7.000	99.125	99.000	98.875	98.750
6.875	98.500	98.375	98.250	98.125
6.750	97.750	97.625	97.500	97.375
6.625	97.125	97.000	96.875	96.750

Jumbo 15yr. Fixed - Program 46G

Rate	15 Day	30 DAY	45 DAY	60 DAY
7.375	101.125	101.125	101.000	100.875
7.250	100.875	100.875	100.750	100.625
7.125	100.500	100.500	100.375	100.250
7.000	100.000	100.000	99.875	99.750
6.875	99.500	99.500	99.375	99.250
6.750	99.000	99.000	98.875	98.750
6.625	98.375	98.375	98.250	98.125
6.500	97.875	97.875	97.750	97.625

PROGRAMS 45B, 45G, 46B & 46G PRICE ADJUSTMENTS

LTV 90.01% - 95.00%	Subtract 0.500
CA Property	Subtract 0.250
Prop. Type: CONDOS 4+ STORIES:	Add .125 to Rate
Escrow Waiver (45G and 46G Only)	Subtract 0.250
No Income Verif.(45B and 46B Only)	Subtract 0.250
Minimum Loan Amount $227,150	

Cash Out Refi	Subtract 0.250
Investment Property	Subtract 1.500
Lender Funded Buydown	Subtract 2.500
Loan Amounts>$650K<$1.MM	Subtract 0.500
Loan Amounts>$1MM<$1.5MM	Subtract 1.000

OVERNIGHT PRICING IS NOT AVAILABLE FOR 45G and 46G

Jumbo 30yr. Fixed - Program 45N

Rate	15 Day	30 DAY	45 DAY	60 DAY
7.375	100.625	100.500	100.375	100.375
7.250	100.125	100.000	99.875	99.875
7.125	99.500	99.375	99.250	99.250
7.000	98.875	98.750	98.625	98.625
6.875	98.125	98.000	97.875	97.875
6.750	97.375	97.250	97.125	97.125
6.625	96.625	96.500	96.375	96.375
6.500	95.750	95.625	95.500	95.500

Jumbo 15yr. Fixed - Program 46N

Rate	15 Day	30 Day	45 Day	60 Day
7.250	101.250	101.125	101.000	100.875
7.125	101.125	100.750	100.625	100.500
7.000	100.625	100.250	100.125	100.000
6.875	100.250	99.875	99.750	99.625
6.750	99.750	99.375	99.250	99.125
6.625	99.125	98.750	98.625	98.500
6.500	98.500	98.125	98.000	97.875
6.375	97.875	97.500	97.375	97.250

PROGRAM 45N AND 46N PRICE ADJUSTMENTS

LTV's Less than 70.00%	Improve 0.375
CA Property	Subtract 0.250
Second Home	Subtract 1.000
Prop. Type: CONDOS 4+ STORIES:	Subtract 1.250
Loan Amounts>$650K<$1.MM	Subtract 0.750

LTV 90.01% - 95.00%	Subtract 1.250
Cash Out Refi	Subtract 0.375
2 Unit Properties	Subtract 0.500
Escrow Waiver	Subtract 0.250

OVERNIGHT PRICING IS NOT AVAILABLE FOR 45N and 46N

Program 47B - 1/1 Arm Jumbo — 2.75% Margin

Rate	15 Days	45 Days	60 Days
6.750%	101.500	101.375	101.250
6.625%	101.375	101.250	101.125
6.500%	101.250	101.125	101.000
6.375%	101.125	101.000	100.875
6.250%	101.000	100.875	100.750
6.125%	100.875	100.750	100.625
6.000%	100.625	100.500	100.375
5.875%	100.375	100.250	100.125

Program 48B - 3/1 Arm Jumbo — 2.75% Margin

Rate	15 Days	45 Days	60 Days
7.750%	101.625	101.500	101.375
7.625%	101.500	101.375	101.250
7.500%	101.375	101.250	101.125
7.375%	101.250	101.125	101.000
7.250%	101.000	100.875	100.750
7.125%	100.750	100.625	100.500
7.000%	100.500	100.375	100.250
6.875%	100.250	100.125	100.000

Program 49B - 5/1 Arm Jumbo — 2.75% Margin

Rate	15 Days	45 Days	60 Days
7.625%	101.875	101.750	101.625
7.500%	101.750	101.625	101.500
7.375%	101.500	101.375	101.250
7.250%	101.250	101.125	101.000
7.125%	101.000	100.875	100.750
7.000%	100.750	100.625	100.500
6.875%	100.500	100.375	100.250
6.750%	100.125	100.000	99.875

Program 50B - 7/1 Arm Jumbo — 2.75% Margin

Rate	15 Days	45 Days	60 Days
7.750%	101.750	101.625	101.500
7.625%	101.625	101.500	101.375
7.500%	101.375	101.250	101.125
7.375%	101.125	101.000	100.875
7.250%	100.875	100.750	100.625
7.125%	100.625	100.500	100.375
7.000%	100.250	100.125	100.000
6.875%	99.875	99.750	99.625

JUMBO ARM PRICE ADJUSTMENTS

5% - 5% LTV Higher Than Guidelines	Subtract 0.500
5% - 10% LTV Higher Than Guidelines	Subtract 1.000
(N/A For Ln Amts over $650K and No LTV's over 90%)	

LTV's below 70.00% (N/A Loans Over $650K):	Improve 0.250
Loan Amounts>$650K<$1.MM	Add .250 TO Jumbo Rate
Loan Amounts>$1MM<$1.5MM	Add .500 TO Jumbo Rate

Account Rep.

Kim Haman	Arizona	602-221-8560
Suzanne Nickolson	Arizona	602-221-8559
Jill Izzard-Sheppard	Colorado	800-222-4205
Karen Zenda	Utah	801-481-5100
Jim Ware	NC, SC, TN., TX and GA.	800-645-0334
Dana Devin	WA / OR	208-642-9575

Account Rep.

Gail Cole	Illinois	847-488-1302
Cliff Borowicz	Illinois	800-724-8144
Mike Laszewski	Michigan	248-383-9332
Mike Tackett	IN, OH, and KY	812-378-3581
Kelley Jones	S. California	760-730-3867
Sharon Llyod	MD / VA	800-450-1030

INDICES	Index	Fully Indexed		
1 Yr. T-Bill	5.550	8.250	FNMA 60 day	7.110
1 Yr. T-Bill	5.710	8.500	PRIME RATE	8.500%
1 Yr. T-Bill	5.720	8.500	Ariz. License#	BK14126

Escrow Waiver Fees

Fixed Rate Programs:*	.250% of loan amount up to $1,000.00
ARM Programs:	.250% of loan amount up to $500.00

* Does Not Apply for Programs 45G, 45N, 46G, and 46N *

Phone Registration/Lock In Hours	Eastern Time	Central Time	Mountain Time*	Pacific Time
Lock In Times (New Registrations Only)	8:00am - 8:15am	7:00am - 8:15am	6:00am - 7:15am	5:00am - 6:15am
Lock In Times/Float to Locks (Phone In Only)	10:00am - 5:00pm	9:00am - 5:00pm	8:00am - 5:00pm	7:00am - 4:00pm
Float Hours (New Registrations Only)	10:00am - 12:00am	9:00am - 11:00pm	8:00am - 10:00pm	7:00am - 9:00pm

RATES & TERMS SUBJECT TO CHANGE W/OUT NOTICE *FOR USE BY BOMC APPROVED BROKERS ONLY *NO PUBLIC DISTRIBUTION

[Enlargement of Portion of Banc One's
January 5, 1998 Rate Sheet]

Banc One Jumbo 30yr. Fixed – Program 45B

Rate	15 Day	30 Day	45 Day	60 Day
8.000	102.250	102.125	102.000	101.750
7.875	102.000	101.875	101.750	101.500
7.750	101.750	101.625	101.500	101.250
7.625	101.375	101.250	101.125	100.875
7.500	101.000	100.875	100.750	100.500
7.375	100.625	100.500	100.375	100.125
7.250	100.250	100.125	100.000	99.750

A. **Settlement Statement**

U.S. Department of Housing and Urban Development

OLD REPUBLIC TITLE AGENCY

OMB No. 2502-0265

B. TYPE OF LOAN			
1. ☐ FHA 2. ☐ FmHA 3. ☒ Conv. Unins. 4. ☐ VA 5. ☐ Conv. Ins.	6. File Number: 42 012061-CD	7. Loan Number: 59274273	8. Mortgage Insurance Case Number:

C. NOTE: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(p.o.c.)" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.

D. Name and Address of Borrower	E. Name and Address of Seller	F. Name and Address of Lender
BETTINA J. SCHEETZ	JOSEPHINE T. CONROY 2426 FARMSTEAD ROAD RICHFIELD, OH 44286	BANC ONE MORTGAGE CORPORATION 1600 E. NORTHERN, SUITE 200 PHOENIX, AZ 85020

G. Property Location	H. Settlement Agent	I. Settlement Date
25202 KANSAS AVENUE SUN LAKES, AZ 85248	Old Republic Title Agency Place of Settlement: 9666 East Riggs Road, Suite 112 Sun Lakes, AZ 85248	08/07/97

J. SUMMARY OF BORROWER'S TRANSACTION		K. SUMMARY OF SELLER'S TRANSACTION	
100. GROSS AMOUNT DUE FROM BORROWER		**400. GROSS AMOUNT DUE TO SELLER**	
101. Contract sales price	86,000.00	401. Contract sales price	86,000.00
102. Personal property		402. Personal property	
103. Settlement charges to borrower (line 1400)	3,160.46	403.	
104.		404.	
105.		405.	
Adjustments for items paid by seller in advance		Adjustments for items paid by seller in advance	
106. City/town taxes to		406. City/town taxes to	
107. County taxes to		407. County taxes to	
108. Assessments to		408. Assessments to	
109. H.O. Assn Dues 08/07/97-01/01/98	160.00	409. H.O. Assn Dues 08/07/97-01/01/98	160.00
110.		410.	
111.		411.	
112.		412.	
113.		413.	
114.		414.	
120. GROSS AMOUNT DUE FROM BORROWER	89,320.46	**420. GROSS AMOUNT DUE TO SELLER**	86,160.00
200. AMOUNTS PAID BY OR IN BEHALF OF BORROWER		**500. REDUCTIONS IN AMOUNT DUE TO SELLER**	
201. Deposit or earnest money (see attached)	20,141.82	501. Excess deposit (see instructions)	
202. Principal amount of new loan(s)	68,800.00	502. Settlement charges to seller (line 1400)	5,983.44
203. Existing loan(s) taken subject to		503. Existing loan(s) taken subject to	
204.		504. Payoff of first mortgage loan	25,258.72
205.		505. Payoff of second mortgage loan	
206.		506. ROOF REPAIRS	857.00
207.		507. H.O. Assn Fees	350.00
208.		508.	
209.		509.	
Adjustments for items unpaid by seller		Adjustments for items unpaid by seller	
210. City/town taxes to		510. City/town taxes to	
211. County taxes 01/01/97 to 08/07/97	447.42	511. County taxes 01/01/97 to 08/07/97	447.42
212. Assessments to		512. Assessments to	
213.		513.	
214.		514.	
215.		515.	
216.		516.	
217.		517.	
218.		518.	
219.		519.	
220. TOTAL PAID BY/FOR BORROWER	89,389.24	**520. TOTAL REDUCTION AMOUNT DUE SELLER**	32,896.58
300. CASH AT SETTLEMENT FROM/TO BORROWER		**600. CASH AT SETTLEMENT TO/FROM SELLER**	
301. Gross amount due from borrower (line 120)	89,320.46	601. Gross amount due to seller (line 420)	86,160.00
302. Less amounts paid by/for borrower (line 220)	(89,389.24)	602. Less reductions in amount due seller (line 520)	(32,896.58)
303. CASH ☐ FROM ☒ TO BORROWER	68.78	603. CASH ☒ TO ☐ FROM SELLER	53,263.42

HUD—1 (3-86)
RESPA, HB 4305.2

FTOIB-(O 8/91

Escrow No.: 42 012061-CD

L. SETTLEMENT CHARGES		Paid From Borrower's Funds At Settlement	Paid From Seller's Funds At Settlement
700. Total sales/broker's comm.	based on price $ 86,000.00 @ 6.000 % = 5,160.(		
Division of commission (line 700) as follows:			
701. $	to		
702. $ 5,160.00	to HOMEOWNERS REALTY		
703. Commission paid at settlement			5,160.00
704.			
800. ITEMS PAYABLE IN CONNECTION WITH LOAN			
801. Loan Origination Fee to Home Mortgage to HOME MORTGAGE FINANCING		688.00	
802. Loan Discount to Home Mortgage to HOME MORTGAGE FINANCING		688.00	
803. Appraisal Fee to Home Mortgage from BETTINA J. SCHUETZ $ 275.00 (poc)			
804. Credit Report to Home Mortgage from BETTINA J. SCHUETZ $ 53.00 (poc)			
805. Lender's Inspection Fee			
806. Mortgage Insurance Application Fee			
807. Assumption Fee			
808. Processing fee to Home Mortgage to HOME MORTGAGE FINANCING		285.00	
809. Doc. prep fee to BOMC		150.00	
810. Escrow waiver fee to BOMC from HOME MORTGAGE FINANCING $ 172.00			
811. Underwriting fee to BOMC		220.00	
812. Tax service fee to BOMC		69.00	
813. Flood cert fee to BOMC		17.00	
814. Mortgage Broker fee to Home Mortgage from BANC O $ 516.00			
900. ITEMS REQUIRED BY LENDER TO BE PAID IN ADVANCE			
901. Interest from 08/07/97 to 09/01/97 @ $ 14.1400 /day		353.50	
902. Mortgage insurance premium for	mo. to		
903. Hazard insurance premium for 1	yrs. to The Charles Company	194.00	
904. Flood insurance premium for	yrs. to		
905.			
1000. RESERVES DEPOSITED WITH LENDER			
1001. Hazard insurance	mo. @ $ /mo.		
1002. Mortgage insurance	mo. @ $ /mo.		
1003. City property taxes	mo. @ $ /mo.		
1004. County property taxes	mo. @ $ /mo.		
1005. Annual assessments	mo. @ $ /mo.		
1006.	mo. @ $ /mo.		
1007.	mo. @ $ /mo.		
1008. Aggregate Accounting Adjustment			
1100. TITLE CHARGES			
1101. Settlement or closing fee	to Old Republic Title Agency	150.00	150.00
1102. Abstract or title search	to		
1103. Title examination	to		
1104. Title insurance binder	to		
1105. Document preparation	to Old Republic Title Agency	25.00	25.00
1106. Notary fees	to		
1107. Attorney's fees	to		
(includes above items numbers)			
1108. Title insurance	to Old Republic Title Agency	257.00	537.00
(includes above items numbers)	1102, 1103, 1108, Indorsements and Additional Title Fees, if any		
1109. Lender's coverage	$ 222.00		
1110. Owner's coverage	$ 537.00		
1111. PostClosing Reconveyance Tracking Fee to Old Republic Title Agency			20.00
1112.			
1113.			
1114.			
1200. GOVERNMENT RECORDING AND TRANSFER CHARGES			
1201. Recording fees: Deed $ 20.00	Mortgage $ 13.00 Releases $ 22.00	43.00	12.00
1202. City/county tax/stamps:	Deed $ Mortgage $		
1203. State tax/stamps:	Deed $ Mortgage $		
1204.			
1205.			
1300. ADDITIONAL SETTLEMENT CHARGES			
1301. Survey	to		
1302. Pest inspection	to SUN LAKES PEST CONTROL		48.00
1303. Additional Charges to Old Republic Title Agency		20.96	31.44
1304.			
1305.			
1306.			
1307.			
1308.			
1309.			
1310.			
1400. TOTAL SETTLEMENT CHARGES (enter on lines 103, Section J and 502, Section K)		3,160.46	5,983.44

To the best of my knowledge, the HUD-1 Settlement Statement which I have prepared is a true and accurate account of the funds which were received and have been or will be disbursed by the undersigned as part of the settlement of this transaction.

Escrow Officer _____ Date _____

FTUS-3056A 6/91

Fe=ow No.: 42 012061-CD
i No: 59274273

Attachment to HUD Statement

DEPOSIT OR EARNEST MONEY -- LINE 201
BETTINA J. SCHUETZ/EARNEST MONEY $ 1,000.00
BETTINA J. SCHUETZ/CLOSING FUNDS $ 19,141.82

REPUBLIC TITLE AGENCY
8666 East Riggs Road, Suite 112 · Sun Lakes, AZ · 85248 · (602) 895-[illegible] · FAX (602) 895-7848

Buyer(s): BETTINA J. SCHUETZ

Seller(s): JOSEPHINE T. CONROY

Property: 25202 KANSAS AVENUE
SUN LAKES, AZ 85248

Date: 08/07/97
Escrow No.: 42 012061-CD
Escrow Officer: Charles Duren
Closing Date: 08/07/97

Additional Charges Attachment

Item	Amount
BUYER	
Additional Charges:	
EXPRESS MAIL	20.96
Additional Charges Total:	20.96
Endorsement(s):	
PUD	25.00
Endorsement(s) Total:	25.00
SELLER	
Additional Charges:	
EXPRESS MAIL FOR PAYOFF	31.44
Additional Charges Total:	31.44

ORTIC-1130 10/98

REPUBLIC TITLE AGENCY
[illegible] East Riggs Road, Suite 112 · Sun Lakes, AZ · 85248 · (602) 895-[illegible] · FAX (602) 895-7848

BETTINA J. SCHUETZ

Date: 08/01/97
Escrow No.: 42 012061-CD
Escrow Officer: Duncan
Closing Date: 08/05/97

Property: 25202 KANSAS AVENUE
SUN LAKES, AZ 85248

Buyer's Estimated Closing Statement

Item		Debits	Credits
Sales Price		86,000.00	
Deposits to Escrow			1,000.00
BETTINA J. SCHUETZ/EARNEST MONEY	1,000.00		
New 1st loan from BANC ONE MORTGAGE CORPORATION			68,800.00
Int. adjustment 08/04/97 to 09/01/97, 28 days @ $14.1400 (est.)		395.92	
Loan Origination Fee to Home Mortgage		688.00	
Loan Discount to Home Mortgage		688.00	
Processing fee to Home Mortgage		285.00	
Doc. prep fee to BOMC		150.00	
Underwriting fee to BOMC		220.00	
Tax service fee to BOMC		69.00	
Flood cert fee to BOMC		17.00	
Paid Outside Closing per Lender:			
Appraisal Fee to Home Mortgage	275.00		
Credit Report to Home Mortgage	55.00		
Tax prepaid reserves for 7 mos. @ $62.14		434.98	
Fire Ins. prepaid reserves for 3 mos. @ $16.17		48.51	
HOME INSPECTION to AAA HOME INSPECTION SERVICE		150.00	
Prorata R.E. Taxes, 01/01/97 to 08/05/97, 214 days @ $2.0713 (est.)		437.21	443.28
Hazard Ins. Premium to The Charles Company		194.00	
Prorata H.O. Assn Dues, 08/05/97 to 01/01/98, 146 days @ $1.1111		est. 162.22	
Lender's Title Insurance		232.00	
Endorsement(s)		25.00	
FHA	25.00		
Escrow Fee		150.00	
Additional Charges		20.96	
EXPRESS MAIL	20.96		
Drawing Fees		25.00	
Recording Fees		43.00	
Due from Buyer (est.)			19,755.31
TOTALS		89,998.59	89,998.59
		86,000.00	86,000.00
		3,998.54	3,998.59
		778.98	778.98
		3,219.81	
		3,365.10	
		3219.81	

The receipt by Escrow Agent of all documents and monies required to transfer title in accordance with these instructions shall be deemed as sufficient indication that all contingencies and/or conditions contained in the purchase agreement by and between the parties herein have been removed, complied with, or will be satisfied outside of escrow. Escrow Agent is hereby authorized and instructed to close escrow.

145.29

BETTINA J. SCHUETZ

FTCIS-580 10-91

128a

D REPUBLIC TITLE AGENCY
. East Riggs Road, Suite 112 · Sun Lakes, AZ · 85248 · (602) 89. . · FAX (602) 895-7848

BETTINA J. SCHUETZ

Date: 08/01/97
Escrow No.: 42 012061-CD
Escrow Officer: Duron
Closing Date: 08/05/97

Property: 25202 KANSAS AVENUE
SUN LAKES, AZ 85248

Buyer's Estimated Closing Statement

Item	Debits	Credits
Sales Price	86,000.00	
Deposits to Escrow		1,000.00
BETTINA J. SCHUETZ/EARNEST MONEY 1,000.00		
New 1st loan from BANC ONE MORTGAGE CORPORATION		68,800.00
Int. adjustment 08/04/97 to 09/01/97, 28 days @ $14.1400 (est.)	395.92	
Loan Origination Fee to Home Mortgage	688.00	
Loan Discount to Home Mortgage	688.00	
Processing fee to Home Mortgage	285.00	
Doc. prep fee to BOMC	150.00	
Underwriting fee to BOMC	220.00	
Tax service fee to BOMC	69.00	
Flood cert fee to BOMC	17.00	
Paid Outside Closing per Lender		
Appraisal Fee to Home Mortgage 275.00		
Credit Report to Home Mortgage 55.00		
Tax prepaid reserves for 7 mos. @ $62.14	434.98	
Fire Ins. prepaid reserves for 3 mos. @ $16.17	48.51	
HOME INSPECTION to AAA HOME INSPECTION SERVICE	150.00	PD.
Prorata R.E. Taxes, 01/01/97 to 08/05/97, 214 days @ $2.0713 (est.)		443.28
Hazard Ins. Premium to The Charles Company	194.00	
Prorata H.O. Assn Dues, 08/05/97 to 01/01/98, 146 days @ $1.1111	est. 162.22	
Lender's Title Insurance	232.00	
Endorsement(s)	25.00	
FUD 25.00		
Escrow Fee	150.00	
Additional Charges	20.96	
EXPRESS MAIL 20.96		
Drawing Fees	25.00	
Recording Fees	43.00	
Due from Buyer (est.)		19,755.31
TOTALS	89,998.59	89,998.59

The receipt by Escrow Agent of all documents and monies required to transfer title in accordance with these instructions shall be deemed as sufficient indication that all contingencies and/or conditions contained in the purchase agreement by and between the parties herein have been removed, complied with, or will be satisfied outside of escrow. Escrow Agent is hereby authorized and instructed to close escrow.

BETTINA J. SCHUETZ

FTCIS-189 10/97

Supreme Court U.S.
FILED
JAN 8 2003
OFFICE OF THE CLERK

No. 02-709

IN THE

Supreme Court of the United States

BETTINA J. SCHUETZ
AND ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

BANC ONE MORTGAGE CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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Counsel for Petitioners

January 8, 2003

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REPLY BRIEF FOR PETITIONERS

Respondent runs away from the important issue that divides the courts of appeals – whether an administrative agency may use informal means to interfere with a statutory private right of action. In *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990), this Court made absolutely clear that agencies lack that authority. Since *Adams Fruit*, five circuits have denied agencies the authority to use their general delegated authority to interfere with private rights of action; three circuits (including the Ninth Circuit in this case, over Judge Kleinfeld's dissent) have held that agencies may use informal policy statements that lack the force of law to interfere with such rights. Most recently, in an opinion issued shortly before respondent filed its brief in opposition, Judges Posner and Easterbrook engaged in an extraordinary disagreement precisely over how *Adams Fruit* affects the level of deference owed to HUD's 2001 Policy Statement. *See Krzalic v. Republic Title Co.*, No. 02-2285 (7th Cir. Dec. 26, 2002), App., *infra*, 1a-14a. Rather than being an "extravagant" issue (Opp. 24), the centrality of *Adams Fruit* is apparent in at least six circuits, even if the Ninth Circuit majority below and two other circuits have failed to recognize it.

1. Respondent barely addresses the petition's core issue: whether the Ninth Circuit should have followed the five circuits that have read *Adams Fruit* to restrict the scope of an agency's authority to issue policy pronouncements that encroach on a court's authority to adjudicate statutorily created private rights of action. *See* Pet. 25-27. The splintered decision by the Seventh Circuit, between two distinguished judges, amplifies the importance of this issue. The Ninth Circuit cannot evade this Court's review simply by ignoring *Adams Fruit*.[1]

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[1] Respondent complains that *Adams Fruit* was a mere "foornote [*sic*] in [petitioner's] reply brief in the court of appeals below" (Opp. 24), while never acknowledging that petitioner has argued throughout this litigation that HUD lacks the power to use informal pronouncements

a. Respondent never addresses petitioner's statutory argument that RESPA § 8(a) plainly provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value *pursuant to any agreement* or understanding" to refer a loan. 12 U.S.C. § 2607(a) (emphasis added). HUD's 2001 Policy Statement[2] interferes with the private right of action explicitly provided to enforce that prohibition (*id.* § 2607(d)) in two ways.

First, HUD purports to exonerate a lender from liability whenever the entire payment received by a broker is "reasonable," notwithstanding that a part of the broker's fee was an explicit referral payment made pursuant to an agreement. *See* 66 Fed. Reg. at 53055; Pet. 16. But § 8 says nothing about the "reasonableness" of a plainly illegal "referral fee."[3] A bribe to obtain business – even if the overall amount of money paid for the service is "reasonable" – is still a bribe when that payment has nothing whatsoever to do with any services rendered, as was the case here. *See* Pet. App. 19a (Kleinfeld, J., dissenting)

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to interfere with the courts' adjudication of class status and liability under RESPA's private right of action. Moreover, *Adams Fruit* was also cited to, but ignored by, the Eighth and Eleventh Circuits in *Glover* and *Heimmermann*, respectively.

[2] Respondent misleadingly calls the 1999 Policy Statement a "response to congressional directives" (Opp. 2) and a "congressional command" (Opp. 24). In fact, the request appeared in a House conference committee report, which is not a statutory enactment by the full Congress and cannot delegate interpretative authority to an agency. *See* Pet. 22. In any event, no member of Congress requested the 2001 Policy Statement; that was HUD's response to pressure from lenders who wanted HUD to repudiate *Culpepper III*'s upholding class certification in a RESPA § 8(a) yield spread premium case. *See* Pet. 20, 22.

[3] Although they disagreed about the import of *Adams Fruit*, Judges Posner and Easterbrook were in complete agreement that RESPA "is not a price-control statute." App., *infra*, 9a; *see id.* at 12a (Easterbrook, J., concurring in part and in the judgment) ("Section 8 is an anti-*kickback* rule, not an anti-*markup* rule."). HUD's notion of a "reasonableness" cap on total broker compensation is completely inconsistent with that view.

("[n]o evidence" that yield spread premium was payment for any services rendered to petitioner).

Second, HUD purports to tell courts *how to examine the relevant evidence of liability* in private civil actions, and in so doing interferes with the court's duty to determine whether a class of plaintiffs meets the Federal Rule of Civil Procedure 23(b)(3) standard that "questions of law or fact common to . . . the class predominate." *See* 66 Fed. Reg. at 53054 ("The legality of any yield spread premium can *only* be evaluated in the context of the test HUD established and the specific factual circumstances applicable to each transaction in which a yield spread premium is used.") (emphasis added); *see also* Pet. 14 n.10 (collecting cites). But this Court has stressed that an agency's judgment "that Congress contemplated a case-by-case adjudication of claims . . . th[at] is incompatible with class relief" is inconsistent with the court's duty to apply Rule 23 to "'all suits of a civil nature' under the [Federal] Rules." *Califano v. Yamasaki*, 442 U.S. 682, 699-700 (1979).[4] The court below nowhere addressed the actual evidence – as found by the district court, and as respondent concedes here – of a standard agreement by respondent to pay yield spread premiums (as calculated using the formulas on rate sheets) if the broker referred the loan to respondent rather than another lender. *See* Pet. 15; Pet. App. 30a, 59a; Opp. 3-5. Instead, the Ninth Circuit treated the 2001 Policy Statement as controlling its analysis and rendering those facts irrelevant. *See* Pet. App. 2a, 11a-17a.

b. In both respects, HUD's 2001 Policy Statement impermissibly encroaches on private rights of action, and the Ninth Circuit's deference to that agency pronouncement runs afoul of *Adams Fruit*. Respondent cannot deny that *Adams Fruit* made absolutely clear that courts "need

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[4] Respondent's claim that a class action "is not necessary for justice to be done" (Opp. 29 (quotation marks omitted)) is plainly preposterous where the average yield spread premium payment ranges from $500-1500.

not defer to the [agency's] view . . . because Congress has expressly established the Judiciary and not the [agency] as the adjudicator of private rights of action arising under the statute." 494 U.S. at 649. Respondent unpersuasively seeks to distinguish *Adams Fruit* (*see* Opp. 24-25) on the ground that the Labor Department there acted outside the scope of its delegated authority, whereas here HUD merely acted in accordance with RESPA § 19(a), which gives the Secretary of HUD general authority "to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions" as necessary to implement RESPA. 12 U.S.C. § 2617(a).

First, in *Adams Fruit*, the Labor Department interpretation at issue was contained in a notice-and-comment regulation issued under its general delegated authority; this Court found that the general authority did not empower the Department to alter the statutorily created private right of action. 494 U.S. at 649-50. As the Court emphasized, the delegation to the agency has to be specifically related to the enforcement provisions for it to be considered within the ambit of *Chevron*. *See id.* at 650 ("No such delegation regarding AWPA's *enforcement provisions* is evident in the statute.") (emphasis added).

Likewise, nothing in RESPA § 19(a) delegates authority to HUD to issue informal policy statements with respect to the private right of action in § 8(d).[5] HUD's general authority to issue "interpretations" does not empower the agency to pretermit a court's consideration, in a private action, of whether evidence of a standard agreement provides the basis for certifying a class to challenge under § 8(a) those yield spread premiums that are paid without any link to services rendered. In this respect, § 19(a) is materially the same as the general authority conferred on the Secretary "to promulgate *standards* implementing

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[5] Nor can respondent rely (Opp. 21) on § 19(b)'s provision for a safe harbor, *see* Opp. 21, because its illegal yield spread premium was paid in 1997, well before the creation of any safe harbor, *see* Pet. 19 n.13.

AWPA's motor vehicle provisions," which this Court explicitly held "does not empower the Secretary to regulate the scope of the judicial power vested by the statute." *Id.* at 650.[6] Yet it is precisely the general delegation of authority contained in § 19(a) that respondent argues is sufficient to justify *Chevron* deference here. *See* Opp. 20-21. In *Krzalic*, as discussed further below, Judges Posner and Easterbrook similarly disagree about the importance of § 19(a) in determining whether *Adams Fruit* bars the granting of *Chevron* deference to the 2001 Policy Statement. *Compare* App., *infra*, 4a *with id.* at 10a-11a.

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[6] Respondent's theory is further belied by § 8(c)(5), which provides that certain payments shall not be deemed illegal under § 8 so long as those types of payments "are specified *in regulations* prescribed by the Secretary, after consultation with the Attorney General" and five other federal agencies. 12 U.S.C. § 2607(c)(5) (emphasis added). At root, respondent's theory is that the general authority in § 19(a) trumps the more specific provision of § 8(c)(5). It is a long-standing canon of construction, however, that "[a] specific provision controls over one of more general application." *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991). There is no dispute that the 2001 Policy Statement was not issued pursuant to § 8(c)(5)'s requirements. Nor do we "read[] Section 8(c) out of the Act" (Opp. 23) by insisting that any exemption from liability promulgated pursuant to that subsection be established in regulations. At the very least, the fact that Congress required HUD to go beyond the normal requirements of notice-and-comment rulemaking to establish such exemptions provides a strong indication that Congress did not intend for HUD's informal interpretations of the existing exemptions in § 8(c) to carry the force of law.

For a similar reason, respondent's reliance (Opp. 22) on *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980), is also misplaced. Respondent mis-cites *Milhollin* in suggesting (Opp. 22) that this Court relied on the general delegation of authority to the Federal Reserve Board to issue interpretations, which is similar to the authority Congress has conferred on HUD. Rather, this Court relied on a specific delegation of authority to the Board's *staff* to issue informal interpretations, by creating a safe harbor for actions in conformity with such interpretations. *See* 444 U.S. at 567; *see also id.* at 566 n.9 (stating that "Congress has conferred special status upon official staff interpretations"). *Milhollin* also took pains to note that it was not deciding that the safe harbor could be invoked for conduct prior to its creation, *see id.* at 567 n.11, which is precisely the situation presented here. *See* note 5, *supra*.

Second, respondent has no answer to the United States' previous acknowledgment in litigation that interpretations issued pursuant to § 19(a) are "not binding." *United States v. Graham Mortgage Corp.*, 740 F.2d 414, 421-22 (6th Cir. 1984); *see* Pet. 19. Yet, to obtain *Chevron* deference, an agency's position must be binding and have the force of law. *See* Pet. 18-20 (discussing *Mead* and collecting cases); *see also* App., *infra*, 11a (Easterbook, J.) ("[I]n private litigation *Chevron* does not give any force to a declaration unaccompanied by the formalities of rulemaking or administrative adjudication.").

c. Although the application of *Adams Fruit* to this case should be clear, the courts of appeals are in widespread conflict over how to apply *Adams Fruit* to agency encroachments on private rights of action, as demonstrated most recently by the Seventh Circuit's *Krzalic* opinions. In *Krzalic*, the majority refused to afford *Chevron* deference to the 2001 Policy Statement's interpretation of RESPA § 8(b)'s prohibition on fee-splitting, which was expressly designed to overrule that court's earlier decision in *Echevarria v. Chicago Title & Trust Co.*, 256 F.3d 623 (7th Cir. 2001). Judge Posner's majority opinion noted that *Adams Fruit* "might seem to cast doubt on *Chevron*'s applicability to [RESPA]," because it, like the statute at issue in *Adams Fruit*, is enforced through private rights of action. App., *infra*, 4a. But Judge Posner then opined that *Chevron* deference could apply because HUD could issue interpretations under § 19(a). *See id.*[7]

Judge Easterbrook expressly took issue with Judge Posner's analysis of *Chevron* deference for HUD's 2001 Policy Statement. In his view, *Adams Fruit* should have disposed of the question, § 19(a) notwithstanding. As Judge Easterbrook explained, *Adams Fruit* holds that, when a statute (like RESPA) is enforced "through private litiga-

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[7] The Seventh Circuit ultimately concluded that HUD's interpretation of § 8(b) was contrary to the plain meaning of RESPA. *See* App., *infra*, 5a-6a; *id.* at 12a (Easterbrook, J.). *See also Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261, 265-68 (4th Cir. 2002) (same).

tion, . . . the view of a federal agency achieves binding force only when incorporated into legislative regulations issued under delegated power." App., *infra*, 10a. Instead of issuing notice-and-comment regulations (or some other formal administrative interpretation that would satisfy *Mead*), however, HUD "issued a broadside and hoped that courts would kowtow." *Id.*-at 11a. Echoing petitioner's position (*see* Pet. 16-25), Judge Easterbrook wrote that, because HUD had "abjure[d] the APA's procedures for making decisions, courts owe the administrative interpretation" only consideration under *Skidmore*, "but nothing more" – certainly not *Chevron* deference. App., *infra*, 11a. Judge Easterbrook thus noted with "[s]urpris[e]" that the Ninth and Eleventh Circuits – in decisions on which respondent bases the bulk of its opposition (*see* Opp. 13-23) – had afforded *Chevron* deference to the 2001 Policy Statement. App., *infra*, 11a. "I am confident that *Heimmermann* and *Schuetz* erred in thinking that the [2001 Policy Statement] is itself conclusive under *Chevron*." *Id.* at 12a.

The disagreement between Judges Posner and Easterbrook over whether *Adams Fruit* limits the scope of HUD's interpretive authority under RESPA displays the confusion among the courts of appeals illustrated in the petition, which explains that five circuits have held that the Environmental Protection Agency, Customs Service, Department of Labor, Federal Aviation Authority, and Department of Transportation lack authority under their general delegations of authority to issue rules or policy interpretations that interfere with statutorily created private rights of action. *See* Pet. 25-27. Respondent makes no serious effort to rebut that charge – arguing in a descriptive, non-explanatory footnote that those decisions "are also distinguishable on largely the same grounds." Opp. 25 n.20. What grounds? In each case, the court of appeals rejected the proposition that a broadly worded delegation of authority conferred power on an agency to issue a rule or interpretation that interfered with the judiciary's power to define the scope of a private right of ac-

tion.[8] Plainly, given the confusion over the past 13 years in applying *Adams Fruit* both in the RESPA context and, more generally, in cases involving other federal agencies,[9] the time is ripe for this Court now to clarify when an agency may use informal administrative process to dictate to courts how to adjudicate a private right of action.[10]

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[8] *See, e.g., Kelley v. EPA*, 15 F.3d 1100, 1105 (D.C. Cir. 1994) (holding that the "broad rulemaking authority to craft" the National Contingency Plan under 42 U.S.C. § 9605 "is hardly a specific delegation of authority to EPA to interpret [the scope of liability in 42 U.S.C. § 9607]"); *see also Dantran, Inc. v. United States Dep't of Labor*, 246 F.3d 36, 47-48 (1st Cir. 2001) (holding that general delegations of authority to Secretary to administer government contracting disputes does not require court to defer to agency interpretations regulating award of attorney's fees under Equal Access to Justice Act); *Fabil Mfg. Co. v. United States*, 237 F.3d 1335, 1341 (Fed. Cir. 2001) (rejecting argument that Customs Service's authority to promulgate rules for importer's standard of proof in agency proceedings was entitled to deference in "establish[ing] the burden of proof in judicial proceedings; that task is for the judiciary or the Congress"). In those cases, the courts of appeals based their holdings on *Adams Fruit*.

[9] Notwithstanding the Federal Circuit's exclusive jurisdiction over customs matters, the Solicitor General's petition for a writ of certiorari in *Mead* stressed that the Federal Circuit's decision not to defer to Customs Service rulings conflicted with courts of appeals' decisions involving a wide range of different federal agencies on whether "agency interpretations adopted by means other than formal regulations are entitled to judicial deference." U.S. Pet. at 17-19, No. 99-1434.

[10] *Chevron* deference is not automatically "inapplicable where a statute creates a private right of action." Opp. 26. Whether *Chevron* applies would turn on the formality of the agency's pronouncement and the specificity of the congressional delegation to the agency to effect such an encroachment. *Adams Fruit*, 494 U.S. at 649-50. Neither facet is present here. Nor is *Auer v. Robbins*, 519 U.S. 452 (1997), apposite. *See* Opp. 26. There, the Secretary of Labor was afforded deference under *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), to an interpretation of regulations construing a statute that specifically conferred authority on the Secretary to issue an exemption. The Court noted both the specificity of the statutory delegation and the principle that deference is due an agency's construction of its own ambiguous regulations. 519 U.S. at 461-63. Here, that principle does not apply because HUD's regulations (24 C.F.R. § 3500.14(b) (Pet. App. 110a)) simply mirror the statutory language of § 8(a) (12 U.S.C. § 2607(a) (Pet. App. 90a)). *See Cunningham v. Scibana*, 259 F.3d 303,

2. This case presents an ideal vehicle to decide the issue presented. *Glover* raised only the issue of class certification, which the respondent there (represented by respondent's counsel here in every court filing in that case except, curiously, the certiorari opposition) opposed on the ground that class certification is "inherently interlocutory." Br. in Opp. at 13, No. 01-1648. This case presents whether HUD may both impose an evidentiary standard that strips away class relief *and* refashion the statutory liability test to exonerate respondent, because the Ninth Circuit affirmed the denial of class certification and the award of summary judgment to respondent entirely on *Chevron* deference, even though the facts in the suit occurred before issuance of the 2001 Policy Statement.

The fact that a remand would be necessary (and thus presumably could address the numerous issues flagged by respondent (Opp. 28) after reversal of the Ninth Circuit's decision) is not a reason to deny certiorari.[11] This Court routinely grants review of issues that are preliminary to the final disposition of the case and remands (where appropriate) for further proceedings. All petitioner asks is to have summary judgment against her and the denial of class certification reversed, and a fair chance on remand to argue her case without the encumbrance of HUD's ham-handed 2001 Policy Statement disposing of her case through an improper application of *Chevron* deference.

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307 n.1 (4th Cir. 2001) (no *Seminole Rock* or *Chevron* deference to informal interpretation of regulation that repeats statutory language).

[11] There is no merit to respondent's suggestion (Opp. 10 n.10) that petitioner's broker "counseled [her] on the relationship between closing costs and interest rate." The cited affidavit (Supp. Exc. 71-74), which is inconsistent with the affiant's deposition (Exc. 127), was not subject to cross-examination and, in any event, nowhere states that the broker explained to petitioner that the yield spread premium was part of an agreement under which she would accept a higher interest rate in exchange for lower closing costs. As petitioner has noted, and Judge Kleinfeld found, there is "[n]o evidence" to support that claim; all the evidence shows that the broker pocketed the lender's payment. *See* Pet. 5-6 & n.3, 10; Pet. App. 19a (Kleinfeld, J., dissenting).

3. This issue is critically important to consumers. HUD's 2001 Policy Statement was a naked attempt to relieve lenders from potential liability to classes of consumers who have been materially harmed by paying inflated interest rates as a result of brokers getting illegal referral fees (in the form of yield spread premiums). HUD admitted as much in a 2002 Notice of Proposed Rulemaking, which respondent simply ignores. *See* Pet. 20-21. In that notice, HUD also (1) reaffirmed its prior position that class actions may be used to enforce RESPA § 8(a) – the very section HUD opined in its 2001 Policy Statement had to be applied on a loan-by-loan individualized basis (Pet. 24; 67 Fed. Reg. at 49155); (2) acknowledged that a yield spread premium can be paid legally in precisely the manner highlighted in the petition (Pet. 25 n.18; 67 Fed. Reg. at 49147-48), but this legal method is undisputedly not how respondent paid the yield spread premiums at issue here; and (3) emphasized that, on conservative estimates, when yield spread premiums are not paid in this manner, half of those payments enrich lenders and brokers at the expense of consumers (67 Fed. Reg. at 49170-71).[12] In determining that billions of dollars each year are illegally extracted from consumers through the higher interest rates foisted upon them through unlawful yield spread premiums, HUD never forthrightly acknowledged having drawn *that* conclusion without any "loan-by-loan" analysis. The notion that HUD can exonerate lenders from liability through informal agency action – and get *Chevron* deference – is a truly disturbing arrogation of power.

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

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[12] Congress amended RESPA to include brokers within its ambit, notwithstanding that RESPA was originally enacted "before the existence of the mortgage brokerage industry" (Opp. 5, 20). Housing and Community Development Act of 1992, Pub. L. No. 102-550, § 908(a), 106 Stat. 3672, 3873 (codified at 12 U.S.C. § 2602(3) (Pet. App. 78a)).

Respectfully submitted,

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January 8, 2003

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 02-2285

NEDZAD KRZALIC AND DANIJELA KRZALIC,
Plaintiffs-Appellants,

v.

REPUBLIC TITLE CO.,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 01 C 9979

Argued November 1, 2002

Decided December 26, 2002

Before: BAUER, POSNER, and EASTERBROOK,
Circuit Judges.

POSNER, Circuit Judge:

Section 8(b) of the Real Estate Settlement Procedures Act, 12 U.S .C. § 2607(b), provides that "no person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed." The plaintiffs in this class action suit contend that the defendant, the closing agent in their purchase of a home, charged them $50 for recording their mortgage yet paid the county recorder only $36. The plaintiffs (who conceded in the district court, but forgot in this court, that they lack standing to challenge a second al-

leged overcharge, made by the sellers of the house for the release of the previous mortgage) claim that the $14 difference pocketed by the defendant represented the receipt of a portion of a charge other than for a service actually performed, and so violated the statutory provision that we quoted.

In *Echevarria v. Chicago Title & Trust Co.*, 256 F.3d 623, 626-28 (7th Cir. 2001), we held, as have other courts, *see Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261, 265-68 (4th Cir. 2002); *Willis v. Quality Mortgage USA, Inc.*, 5 F. Supp. 2d 1306, 1309 (M.D. Ala. 1998), that section 8(b) is an anti-kickback provision. There was no kickback in that case, and there is none here. But in response to our decision, the Department of Housing and Urban Development, which Congress has authorized to "prescribe such regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of" the Act, 12 U.S.C. § 2617(a), issued a policy statement in which, clarifying its previous views on the subject, which had been ambiguous, *see, e.g.*, 24 C.F.R. 3500.14(c); 57 Fed. Reg. 49600, 49605 (Nov. 2, 1992); *Echevarria v. Chicago Title & Trust Co., supra*, 256 F.3d at 627-28, it stated its disagreement with our decision and made clear its view that section 8(b) is not "limited to situations where at least two persons split or share an unearned fee." HUD, *Real Estate Settlement Procedures Act Statement of Policy 2001-1*, 66 Fed. Reg. 53052, 53057 (Oct. 18, 2001). Any repricing of charges, the statement contends, is unlawful. The policy statement was not adopted in a notice and comment rulemaking proceeding or with any other deliberative formalities, and the district judge, refusing on that ground to give the statement *Chevron* deference and declare *Echevarria* defunct, granted the defendant's motion to dismiss the suit for failure to state a claim. HUD has filed an amicus brief in this court in support of the plaintiffs' appeal.

When a statute administered by a federal agency is unclear and the agency is authorized to interpret it, the agency's interpretation, unless unreasonable, may bind a reviewing court in accordance with *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). Ordinarily issues of statutory interpretation are treated as pure issues of law, and no deference is given the interpretation adopted by executive or other officials. But *Chevron*, in effect equating statutory interpretation to policymaking (*cf.* Hans Kelsen, *Pure Theory of Law* 351-353 (Max Knight trans. 1967)), hands over (with certain qualifications) interpretive responsibility to the officials responsible for making policy judgments, when the ordinary interpretive tools used by courts, such as textual interpretation, do not work well.

By taking this position the Court appears to have shifted power from the legislative to the executive branch, and to the so-called "independent" administrative agencies as well, by limiting judicial authority to preserve the deal struck by contending interest groups in the original legislation. For while in principle Congress can step in and curb a straying agency, the practice is often different because of the obstacles to legislating that are built into the federal legislative process, including bicameralism and the Presidential veto. William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 164-67 (1994); Jonathan T. Molot, "Reexamining *Marbury* in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation," 96 *Nw. U.L. Rev.* 1239, 1282 (2002); *see also* William N. Eskridge, Jr. & John Ferejohn, "The Article I, Section 7 Game," 80 *Geo. L.J.* 523, 538-43 (1992). These obstacles give agencies a degree of running room.

Small-d democrats might question *Chevron*'s shift of legislative power to the bureaucracy. But realists, while acknowledging the point and also that it is a fiction to

suppose *Chevron* itself an interpretation of the statutes to which it applies or that the exercise of power by appointed officials is democratic merely because it is authorized by elected officials, will applaud the Supreme Court's recognition that the interpretation of an ambiguous statute is an exercise in policy formulation rather than in reading.

Adams Fruit Co. v. Barrett, 494 U.S. 638, 649-50 (1990), might seem to cast doubt on *Chevron*'s applicability to the Real Estate Settlement Procedures Act, however, because the Court said that "Congress has expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action arising under the statute [a statute for the protection of farm workers]. A precondition to deference under *Chevron* is a congressional delegation of administrative authority . . . . No such delegation regarding AWPA's enforcement provisions is evident in the statute. Rather, Congress established an enforcement scheme independent of the Executive and provided aggrieved farmworkers with direct recourse to federal court where their rights under the statute are violated." RESPA too is enforced by private actions rather than by judicial or administrative proceedings instituted by HUD. But whereas the farm workers' statute had not delegated to the Department of Labor authority to fill gaps in the statute, RESPA explicitly delegates such authority to the Department of Housing and Urban Development, in 12 U.S.C. § 2617(a), which we quoted earlier. Two of the three courts to have considered the question have concluded, albeit without discussion of *Adams Fruit*, that at least some HUD interpretations of RESPA are within the scope of *Chevron*. *Heimmermann v. First Union Mortgage Corp.*, 305 F.3d 1257, 1261-62 (11th Cir. 2002); *Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004, 1012 (9th Cir. 2002).

The third court, in *Glover v. Standard Federal Bank*, 283 F.3d 953, 961-63 (8th Cir. 2002), reached a similar result by the old-fashioned route, mapped in *Skidmore*

v. Swift & Co., 323 U.S. 134, 140 (1944), of granting the degree of deference that an agency's decision invites by virtue of the cogency of its reasoning in relation to the nature of the issue. The more technical the issue is, the less guidance the statute provides to its correct resolution, the more sensible-seeming the agency's decision, and the more deliberative and empirical the procedures employed in arriving at that decision, the greater the deference that a reviewing court will give it.

Barnhart v. Walton, 122 S. Ct. 1265, 1272 (2002), the Supreme Court's most recent decision interpreting *Chevron*, suggests a merger between *Chevron* deference and *Skidmore*'s and *Glover*'s approach of varying the deference that agency decisions receive in accordance with the circumstances: "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue." Or in the words of Professor Pierce, "legislative rules and formal adjudications are always entitled to *Chevron* deference, while less formal pronouncements like interpretative rules and informal adjudications may or may not be entitled to *Chevron* deference. The deference due a less formal pronouncement seems to depend on the results of judicial application of an apparently open-ended list of factors that arguably qualify as 'other indication[s] of a comparable congressional intent' to give a particular type of agency pronouncement the force of law." Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.5, pp. 6-7 (4th ed. Supp. 2003).

We need not penetrate more deeply into this thicket; for even if HUD's interpretations of RESPA are entitled to *Chevron* deference, that deference is not total and as it happens section 8(b) of RESPA will not bear, as a matter of straightforward judicial interpretation (for if such

interpretation dissipates any possible statutory ambiguity and fills any possible gap in the statute, *Chevron* deference is not owed), the meaning that HUD wants to give it. Republic Title did not "accept any portion, split, or percentage of any charge." No one agreed to divide a receipt with Republic. The statutory language describes a situation in which *A* charges *B* (the borrower) a fee of some sort, collects it, and then either splits it with *C* or gives *C* a portion or percentage (other than 50 percent – the situation that the statutory term "split" most naturally describes) of it. *A* might be a lawyer, and *C* a closing agent like Republic Title, and *A* might charge a legal fee to *B* and kick back a share of it to *C* for recommending to the borrower that he use *A*'s services. That would be a form of commercial bribery and is the target of section 8(b). Republic, however, received no part of a fee charged by someone else. The plaintiffs' beef is that the county recorder did *not* charge $50 to record their mortgage; and so he could not have divided it with Republic. Recall, too, that the statute forbids the giving as well as the receiving of any portion, split, or percentage. On the plaintiffs' understanding, they themselves violated the statute because they gave Republic a portion of the fee charged by the county recorder!

In *United States v. Gannon*, 684 F.2d 433, 435-36 (7th Cir. 1981) (en banc), the strongest case for HUD and the plaintiffs but not strong enough, a county clerk charged more than the stated fee and kept the difference. He was accepting in his personal capacity a portion of the fee that he was imposing in his official capacity. It was as if he had kicked back the difference to Republic.

Usually when a statutory provision is clear on its face the court stops there, in order to preserve language as an effective medium of communication from legislatures to courts. If judges won't defer to clear statutory language, legislators will have difficulty imparting a stable meaning to the statutes they enact. But if the clear language, when read in the context of the statute as a whole or of the commercial or other real-world (as

opposed to law-world or word-world) activity that the statute is regulating, points to an unreasonable result, courts do not consider themselves bound by "plain meaning," but have recourse to other interpretive tools in an effort to make sense of the statute. *E.g.*, *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 453-55 (1989); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring); *AM Int'l, Inc. v. Graphic Management Associates, Inc.*, 44 F.3d 572, 577 (7th Cir. 1995); Veronica M. Dougherty, "Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation," 44 *Am. U.L. Rev.* 127 (1994). They do not want to insult the legislature by attributing absurdities to it.

In this case, however, context *reinforces* the implications of the statutory language. On the plaintiffs' and HUD's view, section 8(b) forbids a lender or closing agent to reprice any of the charges that it has incurred and is passing on to the borrower. This would make sense if RESPA were a public-utility or other rate-regulating statute, but it is not. The statute places no ceiling on the amount that a closing agent can charge for its services. At the closing on the Krzalics' real estate transaction, Republic charged them a closing fee of $315 plus various expenses that included the $50 recording fee. Had Republic charged the Krzalics only the actual recording fee of $36, it could have raised its closing fee to $329 and be in the identical economic position that it was in with the repricing of the fee. The plaintiffs and HUD argue that Republic would have been reluctant to do this because then the plaintiffs might have taken their business to a closing agent that charged a lower closing fee. But all that borrowers care about is the bottom line – which in this case was approximately $165,000 – and that would not have been affected by which line contained the $14; the sum of $315 and $50 is identical to the sum of $329 and $36. If borrowers are as price conscious as the Krzalics claim to be (and more power to them), then their lawyers (for the Krzalics were represented by counsel at the closing), who know

what the county recorder charges for routine services, will shop for closing agents who neither reprice such charges nor make compensating upward adjustments in their closing fees.

Nothing is more common than for professionals to reprice the incidental charges that they incur on behalf of their clients. Law firms, for example, typically reprice their copying expenses in their bills to their clients. The client is not hurt because he can easily find out what those expenses actually were, and so it is with the government's charges for routine services in connection with real estate transactions – the charges are not secret. If the real estate settlements industry is competitive, a member of the industry cannot increase the market price for its services by how it allocates its overhead among the different components of its invoices. What is more, if the effect of the plaintiffs' suit were to induce closing agents like Republic to defer levying the charge for recording until it did the recording and thus knew the exact fee, it would be more rather than less difficult for consumers to comparison shop among closing agents.

Maybe, though, there is some hanky-panky going on here that we are missing by assuming away costs of information. When asked at argument why his client reprices the recording fee, Republic's lawyer answered that the precise fee is not known until the documents are recorded, and that occurs after the closing. True, but it's easy enough to estimate within pennies. A visit to the Cook County recorder's Web site reveals that the fee for recording a mortgage is $23 for the first two pages and $2 for each additional page plus 50 cents for service by return mail; so for the eight-page mortgage involved here, the total fee could readily be estimated at $35.50, which is well short of the $50 that Republic charged. And anyway Republic does not refund any overcharge that emerges when the precise fee is learned. Still, to repeat an earlier point, we have difficulty seeing what difference it can make to the consumer where the

$14 "overcharge" appears on the closing statement. And if there is a fraud here, there are plenty of legal remedies, though none so far as we know under RESPA.

But the most important point is that if the practice of repricing incidental charges is a fraud or market failure or abuse of some sort, still it is not a market failure that section 8(b) can reasonably be thought to address, and so a reading of the section that leaves the failure uncured is not a reading that creates a loophole. If RESPA were a price-control statute a loophole would be opened if the firms subject to the statute were allowed to mark up cost items in their bills to whatever height they wanted. It is not a price-control statute.

There is not enough play in the statutory joints to allow HUD to impose its own "interpretation" under the aegis of *Chevron*. But there is a further point. If an agency is to assume the judicial prerogative of statutory interpretation that *Chevron* bestowed upon it, it must use, not necessarily formal adjudicative procedures or its closet nonadjudicative counterpart, which is notice and comment rulemaking (as in *Sierra Club v. EPA*, 311 F.3d 853, 858 (7th Cir. 2002)), but, still, something more formal, more deliberate, than a simple announcement. *See Barnhart v. Walton*, *supra*, 122 S. Ct. at 1271-72; *United States v. Mead Corp.*, 533 U.S. 218, 229-31 (2001). A simple announcement is too far removed from the process by which courts interpret statutes to earn deference. A simple announcement is all we have here. One fine day the policy statement simply appeared in the Federal Register. No public process preceded it – or at least the part of it that concerns section 8(b), for the policy statement deals with other matters as well.

The qualification is important. In 1999 HUD had issued a policy statement concerning yield-spread premiums (a method of spreading the normal up-front closing costs over the life of the mortgage) after meeting with government representatives plus a broad range of consumer and industry groups. 64 Fed. Reg. 10080, 10084 (Mar. 1, 1999). And both that statement and a portion

of the 2001-1 statement (the one on which HUD and the plaintiffs rely here) that further addressed the issue of yield-spread premiums contain a full discussion of that issue. But the discussion in the 2001-1 statement of the unearned-fees (i.e., section 8(b)) issue is perfunctory. It expresses disagreement with our decision in *Echevarria* but gives no reason except that HUD has always regarded such fees as forbidden by the statute, though previously it had failed to make this clear. No evidence or interpretive methodology is mentioned; no abuse pointed to that might justify the contorted interpretation urged by HUD. Its amicus brief alarmingly warns that repricing is "putting home ownership beyond the reach of many Americans," that "HUD is currently investigating over 100 complaints," and that if we don't adopt its interpretation we will be permitting "unscrupulous providers to inflate settlement charges without limit." None of this appears in the policy statement, perhaps because it is silly; a $14 overcharge (if that is how it should be viewed) in a $165,000 purchase is not going to make the difference between owning and renting. It is no surprise that *Heimmermann*, *Schuetz*, and *Glover*, the three decisions we cited earlier that defer to HUD interpretations, all dealt with the part of the 2000-1 statement that concerns yield-spread premiums.

AFFIRMED.

EASTERBROOK, Circuit Judge, concurring in part and concurring in the judgment:

I join my colleagues' opinion except for those portions that discuss *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Real Estate Settlement Practices Act is enforced entirely through private litigation, and *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990), holds that, when this is true, the view of a federal agency achieves binding force only when incorporated into legislative regulations issued under delegated power. The Department of Housing and Urban Development has the power to prescribe regulations, *see* 12 U.S.C. § 2617(a), but

elected instead to announce its interpretation of the statute. It issued a broadside and hoped that courts would kowtow. Yet in private litigation *Chevron* does not give any force to a declaration unaccompanied by the formalities of rulemaking or administrative adjudication. *See also United States v. Mead Corp.*, 533 U.S. 218 (2001). Otherwise the Administrative Procedure Act, which specifies how delegated power is to be exercised, would be a dead letter. When an agency doles out public funds and is a party to the suit, less formal steps may have legal effects, *see Barnhart v. Walton*, 535 U.S. 212 (2002), but ours is not such a situation. If the agency abjures the APA's procedures for making decisions, courts owe the administrative interpretation careful attention, *see Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), but nothing more. "Interpretations contained in policy statements . . . which lack the force of law do not warrant *Chevron*-style deference." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *see also EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256-58 (1991). I do not perceive in *Walton* any "merger" (slip op. 5) between *Chevron* and *Skidmore*, which *Mead* took such pains to distinguish. HUD's interpretation is on the *Skidmore* side of the line.

Surprisingly, two circuits have treated HUD's *Real Estate Settlement Procedures Act Statement of Policy 2001-1*, 66 Fed. Reg. 53052 (Oct. 18, 2001), as equivalent to a regulation. *See Heimmermann v. First Union Mortgage Corp.*, 305 F.3d 1257, 1261 (11th Cir. 2002); *Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004, 1012 (9th Cir. 2002). Yet neither opinion discusses the significance of *Adams Fruit* or *Christensen* in relation to the agency's disregard of those procedures that the APA establishes for the exercise of regulatory authority. *Heimmermann*, *Schuetz*, and a related decision, *Glover v. Standard Federal Bank*, 283 F.3d 953, 963-65 (8th Cir. 2002), concern the treatment of yield-spread premiums under the RESPA, and I have nothing to say about the legal status of that practice. As *Glover* observes, HUD has issued regulations about yield-spread

premiums, and the policy statement may be understood as an interpretation of those regulations, which do have binding status. But I am confident that *Heimmermann* and *Schuetz* erred in thinking that the *Real Estate Settlement Procedures Act Statement of Policy 2001-1* is itself conclusive under *Chevron*, as opposed to informative (and potentially persuasive).

Boulware v. Crossland Mortgage Corp., 291 F.3d 261 (4th Cir. 2002), holds, and all members of this panel agree, that HUD's interpretation of § 8(b), 12 U.S.C. § 2607(b), finds no purchase in the statutory text, is essentially unreasoned, and is neither informative nor persuasive. Section 8 is an anti-*kickback* rule, not an anti-*markup* rule. It does not forbid profit and could not do so, given the closing agent's unfettered ability to set a price for the package of services it offers. *See Mercado v. Calumet Federal Savings & Loan Ass'n*, 763 F.2d 269 (7th Cir. 1985). It would make neither linguistic nor economic sense to describe the difference between wholesale and retail price in the auto business as a "portion, split, or percentage of any charge" because the dealer must pay the manufacturer for inventory. Just so in real estate closings: The Recorder of Deeds' fee is Republic Title's wholesale price for a service; Republic's retail price is higher. Republic bears the costs of transferring the deed to the Recorder; it must pay the salary of employees who process the papers, and maybe it pays a messenger service too. The markup covers these and other costs, such as the bank's fees on the checks written to the Recorder, the cost of capital used to run the business, and the risk that some deeds may be so lengthy that the Recorder's fees will top the charge. Whether or not the $50 exceeds all costs associated with getting the deed filed, nothing has been "split" or kicked back. Services were furnished as described: the deed was filed, and the closing agent performed (and bore the cost of) all the ministerial acts essential to accomplish filing. By announcing that the RESPA forbids markups over wholesale price, HUD has gone off on a tangent. It might as well have said that the salary paid to

the closing agent's staff, or the rent paid to the landlord for space used in the closing, is an illegal "split" of funds received from the customer.

All of this makes *Chevron* by the by, so it is surprising that my colleagues go out of their way to suggest that its approach is undemocratic and that statutory interpretation is just policymaking by another name. In what sense could it be "undemocratic" to have statutory ambiguities resolved, and gaps filled, by elected officials (and those who serve at their pleasure) rather than by judges whose tenure insulates them from the popular will? What is more, textualists are among *Chevron*'s supporters, an odd position if the decision adopts the view that legal texts are empty vessels to be filled by judges (or administrators). All *Chevron* does is acknowledge that decisionmaking authority is shared among branches of government; it does not imply that the only sensible interpretive stance is pragmatic rather than textualist. Nor does *Chevron* surreptitiously transfer authority from the legislative to the executive branch of government. Agencies' interpretive role stems from delegation of authority, not raw ambiguity. That's one reason why *Chevron* does not require courts to implement "interpretations" that agencies announce without following the APA's requirements for rulemaking: following forms is a condition attached to the delegation.

Interpretation differs fundamentally from regulation. Judges do not apply *Chevron* to the Attorney General's interpretation of the Sherman Antitrust Act, whether in public or in private litigation, although the antitrust statutes are notoriously open-ended. Nor do courts accept under *Chevron* the prosecutor's interpretation of ambiguous criminal statutes such as RICO. *Chevron* itself says that delegation is the key; *Adams Fruit* and *Mead* drive the point home. When the holder of a delegated power wields that authority, the legislative plan has been fulfilled, not frustrated. Congress can choose to delegate, or not, statute-by-statute or through framework laws such as the APA; it could undo *Chevron*

across the board if the doctrine functioned as kryptonite to its enactments. All that matters today, however, is that when the executive branch does not employ regulatory power delegated by the legislative branch, resolution of ambiguities in private litigation belongs to the judicial branch.

Supreme Court U.S.
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No. 02-709

IN THE

Supreme Court of the United States

BETTINA J. SCHUETZ,
and all others similarly situated,
Petitioner,

v.

BANC ONE MORTGAGE CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals, consistent with the holdings of this Court and with the decisions of the only two other circuits to have considered the question, properly accorded deference to a two-part liability test set forth in binding policy statements issued by the Department of Housing and Urban Development pursuant to an explicit congressional delegation of authority under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607.

2. Whether the court of appeals, in applying HUD's two-part liability test, properly affirmed the discretionary denial of class certification because loan-specific questions predominate, and properly affirmed the grant of summary judgment in favor of Respondent based upon the undisputed material facts.

PARTIES TO THE PROCEEDING

The Petitioner is Bettina J. Schuetz, individually and as a representative of a putative class of similarly situated persons. The Respondent is Banc One Mortgage Corporation. The petition properly identifies additional parties who participated in the proceedings in the district court but did not participate in the proceedings in the court of appeals.

CORPORATE DISCLOSURE

Respondent Banc One Mortgage Corporation was a wholly-owned subsidiary of Bank One, N.A. (Ohio). On September 1, 2001, Banc One Mortgage Corporation merged with and into Bank One, N.A. (Ohio). Bank One, N.A. (Ohio), the successor by merger to Banc One Mortgage Corporation, is a wholly-owned subsidiary of Bank One Corporation, a corporation which has issued securities to the public.

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STATUTORY AND REGULATORY PROVISIONS INVOLVED

The full text of the following provisions appears in the Petitioner's Appendix ("Pet. App.") at 76a-120a:

12 U.S.C. § 2607(a), (c).
12 U.S.C. § 2617(a), (b).
24 C.F.R. § 3500.4(a)(1)(ii).
24 C.F.R. § 3500.14(g)(1), (2).

The full text of the following provisions appears in the Respondent's Appendix ("RA") at 1a-64a:

Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers; Final Rule, 64 FED. REG. 10,080 (Mar. 1, 1999).

Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b); Final Rule, 66 FED. REG. 53,052 (Oct. 18, 2001).

INTRODUCTION

Petitioner Bettina Schuetz ("Schuetz") seeks review of a Ninth Circuit decision which affirmed the denial of class certification and the grant of summary judgment in favor of Respondent Banc One Mortgage Corporation ("Banc One") in an action challenging lender payments to mortgage brokers under Section 8 of the Real Estate Settlement Procedures Act ("RESPA"). The Ninth Circuit (like the only other two circuits courts to have addressed the same issue) properly deferred to a two-part liability test set forth in two binding policy statements issued by the Department of Housing and Urban Development ("HUD"). In applying HUD's two-part test, the Ninth Circuit properly concluded that individual, not

common, questions predominate and that the district court did not abuse its discretion in denying class certification. The court of appeals also properly affirmed the grant of summary judgment to Banc One, as there were no disputed material facts and Banc One was entitled to judgment as a matter of law under HUD's two-part liability test.

The Petition should be denied for a variety of reasons. First, there is no conflict among the circuits warranting this Court's review. The Ninth Circuit and the only two other circuit courts (the Eighth and Eleventh) to have addressed the issue have uniformly concluded that HUD's statements of policy, issued pursuant to clear statutory authority and in response to congressional directives, are entitled to deference. Indeed, every district court to have considered this question since HUD issued its 2001 Policy Statement has accorded deference to HUD's test. Likewise, the courts of appeals have uniformly concluded that challenges to lender-paid compensation to mortgage brokers under RESPA Section 8 may not proceed as class actions. In addition to the three circuit court decisions, approximately 50 district courts have also denied class certification in analogous cases.

Second, this Court earlier this Term denied certiorari in a petition raising the same question presented by the Petition here. *See Glover v. Standard Fed. Bank*, 283 F.3d 953 (8th Cir), *cert. denied*, No. 01-1648, __ U.S. __, 123 S. Ct. 344 (Oct. 7, 2002). Nothing has occurred in the interim to warrant a different disposition here.

Third, the Ninth Circuit's decision is in full accord with this Court's prior precedent on deference to administrative agencies. The Petition relies primarily on this Court's decision in *Adams Fruit*, which is inapposite because HUD acted pursuant to its congressionally delegated authority to implement RESPA, and because HUD's policy statements did not encroach upon Section 8's private right of action. Moreover, alternative legal grounds, which were presented but not

addressed below, fully support the decision of the court of appeals. At best, Schuetz asks this Court to perform an error-correcting function regarding the class certification and summary judgment rulings of the district court and the court of appeals, an inappropriate reason to grant review. In sum, this Court should deny the Petition.

STATEMENT OF THE CASE

A. The Wholesale Mortgage Industry and Yield Spread Premiums.

Historically, home buyers obtained mortgage loans directly from local banks or savings and loans that used their own retail offices and funds. *See* Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers; Final Rule, 64 FED. REG. 10,080, 10,080 (Mar. 1, 1999) ("1999 Policy Statement") (RA 4a). Starting in the 1980s, independent mortgage brokers began offering mortgage loans at a retail level that were funded and acquired by wholesale lenders at closing. *Id.* Today, mortgage brokers originate approximately half of all mortgage loans made in the United States. *Id.* In addition to furnishing "facilities" and "goods," such as office space, equipment, staff and the documentation that comprises a mortgage loan, mortgage brokers perform myriad "services" necessary to create a loan package for a lender to fund and acquire.[1] *Id.* at 10,081, 10,085 (RA 21a-24a). The amount

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[1] These services include, among other things, taking information from borrowers and completing applications; analyzing prospective borrowers' income and debt and prequalifying borrowers to determine the maximum loan amount they can afford; counseling borrowers about loan products, the lending process, and credit-qualification underwriting issues; collecting and verifying financial information; providing disclosures; obtaining credit reports; ordering legal documents; initiating property inspections and appraisals; preparing loan documents; and participating in closings. *See* 64 FED. REG. at 10,085 (RA 21a-22a).

and difficulty of a broker's work necessarily varies for each particular loan. *Id.* at 10,081 (RA 5a). Like many lenders, Banc One offers mortgage loans both on a retail basis and on a wholesale basis through a national network of approximately 700 nonexclusive mortgage brokers. (Exc. 216-17; Supp. Exc. 166.[2])

A mortgage broker's compensation for originating a loan may be paid directly by the borrower in up-front fees, indirectly by financing the fees through a slightly higher interest rate in exchange for lender payments to the broker, or by some combination of both. *Id.* at 10,081 (RA 5a). HUD has therefore concluded that lender payments to mortgage brokers "foster[] homeownership" by enabling borrowers to obtain loans without paying fees directly. Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b); Final Rule, 66 FED. REG. 53,052, 53,054 (Oct. 18, 2001) ("2001 Policy Statement") (RA 41a). Among the most common types of lender payments are "yield spread premiums," which are calculated, in part, based on the interest rate of the loan. Daily, lenders send brokers rate sheets listing a range of wholesale loan prices, expressed in relationship to a bench-mark "par" interest rate.[3] 1999 Policy Statement, 64 FED. REG. at 10,081 (RA 6a). For loans below the par rate, lenders charge discount points, while for loans above the par rate, lenders pay yield spread premiums. *Id.* Thus, depending upon a

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[2] Citations to the record in the court of appeals are to Appellant Bettina Schuetz's Excerpts of Record ("Exc."), and Appellee Banc One's Supplemental Excerpts of Record ("Supp. Exc.").

[3] Contrary to Petitioner's suggestion (Pet. 5), "par" is not synonymous with market rate or the interest rate at which Banc One will make a loan at retail. A borrower is *not* entitled to a par loan unless the borrower pays *all* the broker's compensation directly. (Exc. 220-23.)

borrower's objectives, financial position, and cash on hand, brokers are able to offer a spectrum of interest rate and up-front cost combinations.[4]

B. The Statutory and Regulatory Framework.

In 1974, before the existence of the mortgage brokerage industry, Congress enacted the Real Estate Settlement Procedures Act ("RESPA") to protect home buyers from "unnecessarily high settlement charges caused by certain abusive practices." 12 U.S.C. § 2601(a) (Pet. App. 76a). In Section 8(a), RESPA prohibits giving or receiving "any fee, kickback, or thing of value pursuant to any agreement or understanding ... that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." *Id.* § 2607(a) (Pet. App. 90a). This general prohibition against referral fees and kickbacks is modified, however, by Section 8(c) of the Act, which provides that "[n]othing in this section [8] shall be construed as prohibiting ... payment for goods or facilities actually furnished or for services actually performed." *Id.* § 2607(c)(2) (Pet. App. 91a).

In Section 19(a) of RESPA, Congress expressly delegated to HUD authority to "prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of this [Act]." *See* 12 U.S.C. § 2617(a) (Pet. App. 94a). HUD has promulgated certain regulations implementing RESPA, *see* 24 C.F.R. § 3500 *et seq.*, commonly referred to as "Regulation X," *id.* § 3500.1. Regulation X specifies that while "Section 8 of RESPA permits . . . payment for goods or facilities actually furnished or for services actually performed," *id.* § 3500.14(g)(1)(iv) (Pet.

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[4] In the case of *no-cost* loans, for example, all the broker's compensation is paid by the lender through a yield spread premium. (Exc. 223; Supp. Exc. 10-11.)

App. 112a), "[i]f the payment ... bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods actually performed or provided," *id.* § 3500.14(g)(2) (Pet. App. 113a).

In Section 19(b), Congress provided a safe harbor from the prohibitions of Section 8 for "any act done or omitted in good faith in conformity with any rule, regulation, or interpretation" by HUD. 12 U.S.C. § 2617(b) (Pet. App. 94a). HUD has provided that such "a rule, regulation or interpretation" includes any "document that is published in the FEDERAL REGISTER by the Secretary and states that it is an 'interpretation,' 'interpretative rule,' 'commentary,' or a 'statement of policy' for purposes of [§ 2617(a)]." 24 C.F.R. § 3500.4(a)(1)(ii) (Pet. App. 106a).

Acting under its congressionally delegated authority in Section 19(a), and in response to a 1998 House Conference Report directive,[5] HUD issued the 1999 Policy Statement setting forth a two-part test for determining the legality of lender payments to mortgage brokers, including yield spread premiums, under Section 8 and Regulation X. *See* 64 FED. REG. at 10,080, 10,084 (RA 1a, 18a-20a). Under the HUD test, the threshold question is "whether there were goods or facilities actually furnished or services actually performed for the total compensation paid to the mortgage broker." *Id.* at 10,085 (RA 20a). To facilitate this initial determination,

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[5] In reaction to lawsuits challenging yield spread premiums under RESPA, the House Conference Report on the Veterans Affairs and HUD Appropriations Act, 1999 ("1998 House Conference Report") directed HUD to issue a "policy statement" within 90 days "to clarify its position" on the legality of lender payments to brokers under RESPA and to provide "guidance" to "the courts" and reduce the "legal uncertainty" surrounding the practice. *Id.* The 1998 House Conference Report emphasized that "Congress never intended payments by lenders to mortgage brokers for goods or facilities actually furnished or for services actually performed to be violations" of Section 8 of RESPA. *See* H.R. Conf. Rep. No. 105-769, at 260 (1998).

HUD identifies a typical set of compensable services and sets out minimum requirements for the number and types of such services that must be performed in order to satisfy step one. *Id.* (RA 21a-22a). The second—and determinative—question under the HUD test is whether the total compensation paid to the broker "is reasonably related to the value of the goods or facilities that were actually furnished or services that were actually performed." *Id.* at 10,085-86 (RA 24a-28a). Under this latter step, "total compensation" encompasses both direct fees (from the borrower) and indirect fees (from the lender), including payments that are based on the "interest rate" of a loan, like yield spread premiums. *Id.* at 10,084, 10,086 (RA 26a). This "total compensation" must be "commensurate with that amount normally charged for similar services" which "requires careful consideration of fees paid in relation to price structures and practices in similar transactions and in similar markets." *Id.* at 10,086 (RA 25a).

Most courts found that the HUD two-part test was clear, and that application of the test necessitated inquiry into the specific facts of each loan transaction, resulting in denials of class certification in dozens of RESPA yield spread premium cases around the country.[6] The only significant departure from this consistency was *Culpepper v. Irwin Mortgage Corp*, 253 F.3d 1324 (11th Cir. 2001), *cert. denied*, 534 U.S. 1118 (2002), where the Eleventh Circuit initially upheld class certification, holding that HUD's 1999 Policy Statement carried "the force of law," *id.* at 1329, but that it was "ambiguous." *Id.* at 1327. At that time, the Eleventh Circuit held, under its interpretation of HUD's test, that lender payments to brokers could be inferred to violate RESPA to the extent that the payments, analyzed in isolation, were calculated by the lender based on the interest rate on the rate sheet, rather than negotiated loan-by-loan. *See id.* at 1326, 1329-32.

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[6] *See infra* note 15.

Acting again pursuant to its authority under Section 19(a), and in response to conflicting judicial interpretations as a result of the Eleventh Circuit's decision in *Culpepper*, HUD issued the 2001 Policy Statement to "clarify" and "eliminate any ambiguity" in the 1999 Policy Statement. *See* 66 FED. REG. at 53,052, 53,053 (RA 33a, 37a). The 2001 Policy Statement "disagrees" with *Culpepper*, *id.* at 53,054-55 (RA 44a-45a), making clear that the "amount of the [yield spread premium] is not, under the HUD test, scrutinized separately and apart from total broker compensation." *Id.* at 53,053 (RA 37a). The 2001 Policy Statement emphasized that:

> [N]either Section 8(a) of RESPA nor the 1999 Statement of Policy supports the conclusion [of *Culpepper*] that a yield spread premium can be presumed to be a referral fee based solely upon the fact that the lender pays the broker a yield spread premium that is based upon a rate sheet, or because the lender does not have specific knowledge of what services the broker has performed.

Id. at 53,055 (RA 45a). Recognizing that *Culpepper* would eliminate lender payments that foster homeownership, HUD explained that the legality of a particular yield spread premium "cannot be determined by the use of a rate sheet," *id. 46a*, because yield spread premiums "are by definition derived from the interest rate," and "a rate sheet is merely a mechanism for displaying the yield spread premium, and does not indicate whether a particular yield spread premium is a payment for ... services...." *Id.* (RA 46a). Nothing in the 1999 Policy Statement, HUD explained, supported an analysis that "focus[es] exclusively on the presumed intent of the lender in making the payments." *Id.* at 53,054 (RA 44a). To the contrary, HUD relied upon "common industry practice" in which "lenders typically know that brokers have performed the services required." *Id.* at 53,055 (RA 45a).

HUD thus left no doubt that "[t]he legality of any yield spread premium can only be evaluated in the context of the test HUD established and the specific factual circumstances

applicable to each transaction in which a yield spread premium is used." *Id.* at 53,054 (RA 43a). As a result, the Eleventh Circuit "overrule[d]" *Culpepper* in *Heimmermann v. First Union Mortgage Corp.*, 305 F.3d 1257, 1264 (11th Cir. 2002), another case challenging yield spread premiums under Section 8 of RESPA. With *Heimmermann*, the Eleventh Circuit joins the only two other circuits to address the issue—the Ninth Circuit in this case and the Eighth Circuit in *Glover*, 283 F.3d 953—in affording deference to HUD's interpretation and rejecting class certification.

C. History of the Proceedings Below.

In August 1997, Schuetz, who was not an unsophisticated borrower,[7] wanted to finance the purchase of a home in the Sun Lakes Country Club in Arizona. Schuetz used a mortgage broker, Home Mortgage, to obtain a mortgage loan from Banc One in the amount of $68,800 at an interest rate of 7.5%.[8] (Supp. Exc. 168, 176.) Schuetz paid a $688 origination fee, a $688 discount fee, and a $285 processing fee to Home Mortgage, which received the rest of its compensation through a $516 yield spread premium from Banc One.[9] (Pet.

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[7] Schuetz formerly co-owned a residential construction company (Exc. 247) and had previously financed the purchase of two of her own homes. (*Id.* 247-48). She also had her realtor represent her in arranging for financing. (*Id.* 249-50.)

[8] Schuetz, who was familiar with prevailing interest rates (Exc. 258), originally applied for a loan with an 8% interest rate. (Supp. Exc. 48.) She chose not to lock in an interest rate at the time of application. (Supp. Exc. 54.) Instead, she checked with her regular bank (Exc. 270) to see if she could "save on anything." (*Id.*)

[9] Schuetz contends incorrectly that she "paid one 'discount point' to lower her interest rate." (Pet. 6.) Such discount points are paid to the *lender* funding the loan. Schuetz did *not* pay Banc One a discount point; rather, she paid her *broker* a "loan discount" fee (Pet. App. 125a), which was part of the broker's compensation for services rendered. (Exc. 123.) The name of the payment to the broker is irrelevant under HUD's test, which requires analysis of the broker's total compensation, whatever

App. 125a; Supp. Exc. 168.) The yield spread premium was disclosed to Schuetz on the good faith estimate she received at the time of application (Pet. App. 43a; Supp. Exc. 53, 190), and on the HUD-1 settlement statement she received at closing (Pet. App. 43a, 125a; Exc. 126), in precisely the manner mandated by HUD.[10] *See* 24 C.F.R. pt. 3500, App. B, Illus. 13; 64 FED. REG. at 10,087 (RA 29a); *see also* 24 C.F.R. pt. 3500, App. A, Section L (Instructions for Completing HUD-1). Although Schuetz refused to pay another type of settlement fee at closing (Exc. 124), she neither questioned nor objected to the yield spread premium.[11] (Exc. 255, 263.)

In February 1998, Schuetz commenced a class action lawsuit alleging that Banc One's payment of yield spread premiums violated Section 8 of RESPA. In March of the next year, and without benefit of HUD's 1999 Policy Statement, which was issued about the same time, the district court

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its form, not some portion of it in isolation. *See* 64 FED. REG. at 10,084 (RA 19a-20a).

[10] Schuetz asserts, incorrectly, that the yield spread premium should have been disclosed differently on her HUD-1 form. (Pet. 5-6.) HUD has made clear that Schuetz's suggested disclosure is not required. *See* 64 FED. REG. at 10,087 (RA 29a). Schuetz also ignores that she received (Exc. 127) HUD's settlement costs booklet explaining the settlement process, 41 FED. REG. 23,620 (June 10, 1976), 52 FED. REG. 13,566 (Apr. 23, 1987), and describing the sources of broker compensation and their relationship to points and interest rates. 62 FED. REG. 31,982 (June 11, 1997). Referring to statements of *another broker*, not involved with Schuetz's loan, Schuetz suggests, misleadingly, that *her broker* does not inform borrowers of the par rate (Pet. 5), ignoring Home Mortgage's testimony that it counseled Schuetz on the relationship between closing costs and interest rate. (Exc. 127; Supp. Exc. 71-74, 190-91.)

[11] Schuetz refused to pay a $172 escrow waiver fee charged by Banc One (Exc. 124), which Home Mortgage then paid for Schuetz (*id.*), thus reducing the amount of the yield spread premium from $516 to $344. (*Id.* 126.)

denied class certification on the grounds that whether the yield spread premium constituted reasonable payment for the broker's services could be resolved only on a loan-by-loan basis. (Pet. App. 56a.) In September 2000, deferring to the two-part test set forth in HUD's 1999 Policy Statement, the district court granted summary judgment in favor of Banc One, finding the record evidence undisputed that Home Mortgage had provided the requisite number and type of services identified by HUD and that Home Mortgage's total compensation was reasonable in relation to the market value of those services. (*Id.* 43a-47a.)

The Ninth Circuit affirmed both the denial of class certification and the grant of summary judgment to Banc One. In holding that HUD's interpretation in the 1999 and 2001 Policy Statements was entitled to *Chevron* deference, the Ninth Circuit recognized that Section 8 of RESPA does not specifically address the legality of yield spread premiums. (*Id.* 14a.) The Ninth Circuit also noted that "Congress authorized [HUD] to interpret RESPA, HUD has responsibility for enforcing the statute, and it has expertise in the home mortgage lending industry." (*Id.*) The Ninth Circuit concluded that HUD's interpretation is a reasonable construction of the statute, adopting the reasoning of the Eighth Circuit in *Glover*. (*Id.* 14a-15a.) HUD's two-part test, the Ninth Circuit explained, is consistent with RESPA's purpose because it "foster[s] home ownership" by enabling borrowers "with a dearth of cash at the time of settlement [to] front less money and pay for some of their mortgage broker's services over time," while at the same time "prohibiting payments that are for nothing else than the referral of business." (*Id.* 15a.)

The Ninth Circuit also held—citing *Barnhart v. Walton*, 535 U.S. 212, __, 122 S. Ct 1265, 1271 (2002) and *United States v. Mead Corp.*, 533 U.S. 218, 231 (2002)—that HUD's Policy Statements were subject to sufficiently formal process to warrant *Chevron* deference, despite the absence of notice-and-comment rulemaking. (Pet. App. 13a-14a.) In so

holding, the Ninth Circuit noted that HUD's 1999 Policy Statement, which was issued after consultation with interested industry, consumer, and government groups (*id.* 9a), was a direct result of the 1998 House Conference Report directing HUD to issue a policy statement on the subject within 90 days. (*Id.* at 14a.) The court recognized that the 2001 Policy Statement merely clarifies and is consistent with the 1999 Policy Statement. (*Id.* 12a.) And both Policy Statements, the court noted, were published in the FEDERAL REGISTER. (*Id.* 14a.) Finally, the Ninth Circuit noted that in Section 19(a) Congress gave HUD the authority to "interpret" RESPA, that Congress intended such interpretations to be binding under Section 19(b)'s good faith compliance safe harbor, and that HUD's Policy Statements qualify for that safe harbor. (*Id.*)

Having concluded that HUD's Policy Statements set forth the governing standard for determining whether mortgage broker compensation violates Section 8, the Ninth Circuit held that the district court properly granted summary judgment to Banc One because it was undisputed that HUD's two-part test was satisfied in Schuetz's transaction. (*Id.* 17a.) The Ninth Circuit explained that, with respect to part one of the test, the evidence was undisputed that "Schuetz's mortgage broker provided her a host of compensable ... services," and under part two of the test, it was undisputed that "the broker's total compensation, including direct as well as indirect fees, was consistent with local practice and reasonably related to the value that [the broker] contributed to Schuetz's transaction." (*Id.*)

Recognizing that the same individualized examination performed by the district court under the HUD test in the Schuetz transaction would have to be repeated for every putative class member's loan transaction, the Ninth Circuit held that "the district court did not abuse its discretion in denying class certification." (*Id.*) The court reasoned "that individual issues predominate, and that a class action is not

superior," because "[y]ield spread premiums are not illegal per se, so whether they amount to a prohibited referral in any particular case depends upon the services provided by the broker and the total compensation paid for those services."[12] (*Id.*)

Judge Kleinfeld dissented, relying primarily on the Eleventh Circuit's decision in *Culpepper* (*id.* 18a), which has since been overruled by the Eleventh Circuit in light of HUD's 2001 Policy Statement. *Heimmermann,* 305 F.3d at 1264.

REASONS FOR DENYING THE PETITION

I. THE NINTH CIRCUIT'S OPINION IS CONSISTENT WITH THE DECISIONS OF OTHER COURTS OF APPEALS ADDRESSING DEFERENCE TO HUD'S POLICY STATEMENTS AND CLASS CERTIFICATION IN YIELD SPREAD PREMIUM CASES.

Attempting to portray the decision below as reaching an anomalous result, Schuetz all but ignores the paramount fact that the Ninth Circuit is consistent with the only two other courts of appeals (the Eleventh and the Eighth Circuits) to decide the same issue in analogous yield spread premium cases. Both the Eleventh and Eighth Circuits have held that HUD's interpretation in its 1999 and 2001 Policy Statements is entitled to judicial deference and that HUD's two-part

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[12] Schuetz makes too much out of the fact that the district court, in denying class certification, applied a test that focused, in part, on the intent of the broker and borrower, which is not part of the HUD test. (Pet. 15 n.11.) The district court, without the benefit of HUD's 1999 Policy Statement, applied a test used by a number of other district courts to reach a similar conclusion that individual issues predominate. (Pet. App. 69a-71a.) In its subsequent summary judgment order, the district court applied HUD's two-part test. (*Id.* 42a-47a.) As the court of appeals recognized, class certification is inappropriate under HUD's two-part test.

test requires a loan-specific analysis, which precluded class certification of materially identical claims that yield spread premiums violate Section 8 of RESPA.

Like the Ninth Circuit opinion below, the Eleventh Circuit in *Heimmermann* held that HUD's interpretation of Section 8 of RESPA, as set forth in the 1999 Policy Statement and clarified in the 2001 Policy Statement, was entitled to *Chevron* deference. *See* 305 F.3d at 1261. The Eleventh Circuit first recognized that RESPA "does not, by its plain language, speak to the standard for determining whether the payment of a [yield spread premium] violates the Act." *Id.* The Eleventh Circuit then pointed out that HUD's Policy Statements fall squarely within Congress's "express delegation of authority" to HUD to issue "interpretations" of RESPA. *Id.* at 1261-62. Because HUD was acting within its congressionally delegated interpretative authority, the Eleventh Circuit reasoned that *Chevron* deference was appropriate, even without notice-and-comment. *Id.* at 1262 (citing *Barnhart*, 122 S. Ct. at 1271; *Mead*, 533 U.S. at 231). The Eleventh Circuit also "reject[ed] the argument that the 2001 [Policy Statement] is due no deference because it is inconsistent with earlier expressions of HUD's position." *Id.* at 1262. *See id.* ("we cannot say that the official position of HUD on the present issue has been inconsistent").

Having concluded that HUD's interpretation "is within the realm of agency interpretations that carry force of law and are due broad deference," the Eleventh Circuit examined whether HUD's interpretation is consistent with congressional intent. *Id.* at 1262. The court reasoned that "[t]he test laid out in the 2001 [Policy Statement], which does ban fees in excess of what would be reasonable compensation for the broker's service, seems to fulfill [RESPA's] ultimate goal" of "'the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services.'" *Id.* at 1262 (quoting 12 U.S.C. § 2601(b)(2)). The court also noted that by requiring that a broker provide a certain number and

type of services HUD's test prevents "a payment to a broker who provides 'no, nominal, or duplicative work.'" *Id.* at 1264 n.8.

The Eleventh Circuit then turned to the question of class certification, concluding that application of HUD's test to the allegations in *Heimmermann* requires loan-specific analysis rendering a class action inappropriate under Rule 23. *Id.* at 1263. The court explained that under the HUD test

> the first step in assessing whether RESPA has been violated is to determine whether the broker has provided goods or services of the kind typically associated with a mortgage transaction.... If this first step is satisfied, the fact-finder must proceed to the second step: determining whether the total compensation paid to the broker is reasonably related to the total value of the goods or services actually provided.

Id. at 1263-64 (citation omitted). Application of HUD's test, the court recognized, renders class certification inappropriate because "it is necessary to determine whether compensable services were provided by the broker and whether the total amount of broker compensation was reasonable in light of the circumstances of each loan." *Id.* at 1264.

The Eleventh Circuit also expressly "overrule[d]" its prior decision in *Culpepper*. *See Heimmermann*, 305 F.3d at 1264. *Culpepper* is relied upon by both the dissent (Pet. App. 18a) and Schuetz. (Pet. 9, 23.) In *Heimmermann*, the Eleventh Circuit explained that in *Culpepper* it had found HUD's 1999 Policy Statement "ambiguous" and that HUD's 2001 Policy Statement "clarifies that ambiguity." 305 F.3d at 1262. The Eleventh Circuit thus concluded:

> [T]he substance of the 2001 [Policy Statement] compels a different result in this case than the result in *Culpepper III*. The 2001 [Policy Statement] explicitly rejects the foundation of *Culpepper III*: "neither Section 8(a) of RESPA nor the 1999 [Policy Statement] supports the

> conclusion that a yield spread premium can be presumed to be a referral fee based solely upon the fact that the lender pays the broker a yield spread premium that is based upon a rate sheet, or because the lender does not have specific knowledge of what services the broker has performed."

Id. at 1263 (quoting 66 FED. REG. at 53,055). The court recognized, "[t]hat we may have determined in *Culpepper III* that a different interpretation of RESPA (in our view) is better or more consistent with the statutory language does not require—or even allow—us to reject HUD's interpretation."[13] *Id.* at 1262. Thus, *Culpepper* is no longer good law in the Eleventh Circuit, and Judge Kleinfeld's statement in dissent that there is a "circuit split" (Pet. App. 18a) is now clearly no longer accurate, to the extent it ever was true.[14] Surprisingly, Schuetz refers to *Heimmermann* only once, in a footnote. (Pet. 9 n.8.)

In *Glover*, the Eighth Circuit also held that HUD's Policy Statements were entitled to deference, albeit under a slightly different rationale. Like the Ninth Circuit below and the Eleventh Circuit in *Heimmermann*, the Eighth Circuit recognized that Section 8 does not directly address the legality of yield spread premiums and that HUD's regulation

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[13] Schuetz's assertion (Pet. 9 n.8) that *Heimmermann* "conflict[s]" with the Eleventh Circuit's reading of RESPA in *Culpepper* is belied by the *Heimmermann* opinion itself. In *Heimmermann*, the same three judge panel that had decided *Culpepper* explained: "Our ruling in *Culpepper III* did not purport to rely squarely upon the plain language of Section 8 of RESPA, but rather upon an interpretation of RESPA's language and of the 'ambiguous' 1999 [Policy Statement]." 305 F.3d at 1261 (emphasis omitted). The court also noted that in *Culpepper* it had held that the 1999 Policy Statement carried "the force of a regulation." *Id.* at 1261 n.6 (citing *Culpepper*, 253 F.3d at 1327).

[14] There was really never a *true* conflict because the Eleventh Circuit in *Culpepper* had not had the opportunity to address HUD's 2001 Policy Statement. *See Glover*, 283 F.3d at 964 n.9.

implementing RESPA "simply mirrors" the statute, 283 F.3d at 961, and "continues the statutory ambiguity." *Id.* at 962. The Eighth Circuit then cited two independent lines of authority as supporting deference to HUD. First, the court cited *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945) and its progeny—*Christensen v. Harris County*, 529 U.S. 576, 588 (2000); *Auer v. Robbins*, 519 U.S. 452, 461 (1997)—for the proposition that an agency's interpretation of its own ambiguous regulation is entitled to judicial deference. 283 F.3d at 962. The Eighth Circuit held, under this line of authority, that "HUD's Policy Statements interpreting its own ambiguous regulation are controlling authority unless they are plainly erroneous or inconsistent with the regulation or the purpose of RESPA." *Id.* Second, the Eighth Circuit held that deference is appropriate under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) because "HUD's Policy Statements ... pack sufficient power to persuade given HUD's specialized mission, experience and broad investigation into the consumer lending market." 283 F.3d at 962.

Like the Eleventh Circuit in *Heimmermann* and the Ninth Circuit in this case, the Eighth Circuit concluded that HUD's two-part test is consistent with the regulation and the purpose of RESPA. *See id.* at 964. The Eighth Circuit recognized, moreover, that the same interpretation urged by Schuetz here is contrary to RESPA, as it essentially reads the "permissive language of Section 8(c)" out of RESPA. *Id.* The result of this approach, the Eighth Circuit explained, would be to render yield spread premiums *per se* illegal, which Congress clearly did not intend. *See id.* ("In the context of the residential loan industry as it exists today, we have difficulty seeing many, if any, factual situations in which a [yield spread premium] could lawfully coexist with [plaintiff's] contentions"). The court further explained that under Schuetz's approach here "it is almost certain that at least some legitimate Section 8(c) activities now performed by

mortgage brokers will be left uncompensated" and "the present borrower/broker/lender relationship will disintegrate, at least for those buyers who must borrow above par in order to finance settlement services." *Id.* at 965. HUD's Policy Statements, the court concluded, are entitled to deference under either *Seminole Rock* or *Skidmore* because they "reflect a reasoned view of a responsible agency which is consistent with the statute and the regulation and which constitutes a body of experience and informed judgment that this court may look to as determinative authority." *Id.* at 962-63.

Having decided that it must defer to HUD's interpretation, the Eighth Circuit went on to hold that class treatment was inappropriate. Applying HUD's two-part test to the allegations in that case, the Eighth Circuit reasoned that "loan-specific analysis is required in determining whether the payment of a [yield spread premium] is based upon services rendered or an illegal referral." *Id.* at 966.

In sum, the Ninth Circuit's opinion below is consistent with the only two other circuits to address deference to HUD's Policy Statements and class certification in materially identical cases challenging yield spread premiums under Section 8 of RESPA.[15] The courts of appeals have uniformly

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[15] Federal district court decisions around the country are also uniform in holding that HUD's interpretation is entitled to deference and that application of HUD's two-part test raises transaction specific inquiry that precludes class certification in analogous cases challenging yield spread premiums under Section 8 of RESPA. Approximately 50 federal district courts around the nation have denied class certification in analogous cases, some of which predate HUD's Policy Statements. Subsequent to HUD's 2001 Policy Statement, every court has deferred to HUD and denied class certification in such cases. A number of district courts have also granted summary judgment to lenders where the facts were undisputed that HUD's two-part test was satisfied. Conversely, there is no authority anywhere in the country to support Schuetz's arguments regarding HUD's test. Schuetz's arguments have been rejected by every court to consider them. (*See* Appellee Banc One's C.A. Brief at 20-21, 48-50 (citing cases).)

concluded that HUD's 2001 Policy Statement is a lawful and reasonable interpretation of Section 8 of RESPA and requires denial of class certification under the circumstances and allegations presented here. Schuetz does not dispute that there is no circuit split. This Court's review is unwarranted.

II. THE NINTH CIRCUIT'S OPINION IS CONSISTENT WITH THIS COURT'S DEFERENCE PRECEDENT.

A. Given the complete absence of any conflict among the courts of appeals on the precise question presented by the decision below, Schuetz stretches to present more abstract questions about the Ninth Circuit's decision to defer to HUD. Schuetz asks the Court to grant *certiorari* to review whether the Ninth Circuit erred in its case-specific, fact-bound application of this Court's existing deference precedent. (Pet. at 13.) Schuetz even goes so far as to suggest that the Court review the factual record and determine whether the Ninth Circuit's affirmance of the discretionary denial of class certification and grant of summary judgment were supported by the record.[16] (Pet. at 7, 11.) The Court does not grant *certiorari* to correct errors. Many of these same arguments that Schuetz raises here were previously presented to the Court in a petition for *certiorari* of the Eighth Circuit's

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[16] Schuetz asserts that the yield spread premium was not for services, citing the dissent and claiming that there was no evidence that the yield spread premium was used to offset up-front costs. (Pet. 10-11.) This argument ignores the fact that whether the yield spread premium constituted payment for services is determined by applying HUD's two-part test and that both the district court and Ninth Circuit found that test was satisfied by the undisputed evidence. (Pet. App. 17a, 44a-47a.) That the yield spread premium offset Schuetz's closing costs is further evidenced, as the Ninth Circuit recognized, by the undisputed fact that Schuetz's broker "would not have originated her loan for only the direct fees that she personally paid up front" (*Id.* 17a), which is supported by the record. (Supp. Exc. 178, 190-91.)

Glover decision, where the petitioner was represented by many of the same counsel who represent Schuetz here. This Court denied the *Glover* petition earlier this Term. This case is no more worthy of this Court's plenary review than *Glover*. Nothing has changed.

B. Schuetz's arguments that the Ninth Circuit erred in affording *Chevron* deference to HUD's Policy Statements do not support granting the Petition here. The Ninth Circuit correctly deferred to HUD. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984) (where Congress has delegated to an agency the authority to implement a statute and the statute is silent or ambiguous on the precise question at issue, the agency's reasonable interpretation of the statute is entitled to controlling weight). Contrary to Schuetz's assertion[17] (Pet. 16, 17), RESPA does not address the precise question at issue; the statute does not specify how to determine whether a lender payment to a mortgage broker falls within the prohibition of referral fees under Section 8(a) or the permissive language for services rendered under Section 8(c). Indeed, as noted previously, RESPA was enacted in 1974, long before the advent of mortgage brokers, wholesale lenders, and yield spread premiums, which did not exist until the 1980s. This statutory ambiguity was recognized by the Ninth Circuit below, the Eighth and Eleventh Circuits, and the 1998 Conference Report directing HUD to clarify its position on the issue.

Nor can it be disputed that in Section 19(a) Congress delegated to HUD broad authority to implement RESPA and that HUD's Policy Statements fall squarely within this delegated authority. Schuetz's argument that HUD's interpretation is not entitled to *Chevron* deference because the

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[17] Schuetz undermines her own argument that Section 8 is clear and unambiguous by relying elsewhere in the Petition on legislative history (Pet. 3-4) in an effort to support her interpretation. As shown *infra*, the legislative history likewise does not support Schuetz's interpretation.

Policy Statements were not subject to notice-and-comment rulemaking (Pet. 21) completely misses the mark. This Court recently reaffirmed that notice-and-comment rulemaking is not necessary to invoke *Chevron* deference. *See Mead*, 533 U.S. at 230-31; *Barnhart*, 122 S. Ct. at 1271-72. Schuetz's argument ignores Section 19(a), in which Congress expressly delegated to HUD the authority to issue "interpretations" of RESPA, in addition to notice-and-comment "rules and regulations." Congress's intent that HUD's interpretations carry force of law, *see Mead*, 533 U.S. at 226-27, is evidenced further by the statutory safe harbor in Section 19(b) for good faith compliance with any HUD "rule, regulation, or interpretation." HUD acted squarely within that congressionally delegated authority, *see id.*, when it issued the Policy Statements. HUD expressly invoked its interpretative authority under Section 19(a) and followed all the formalities, including publication in the FEDERAL REGISTER, necessary to make the Policy Statements binding under RESPA's good faith safe harbor.[18] HUD also consulted with interested parties, including consumer groups. *See* 66 FED. REG. at 53,052 (RA 36a); 64 FED. REG. at 10,084 (RA 18a); HUD News Release No. 01-105 (Oct. 15, 2001), www.hud.gov/news/morereleases.cfm.[19]

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[18] Contrary to Schuetz's misplaced assertions (Pet. 18-19), HUD's Policy Statements are nothing like the ruling letters at issue in *Mead*, which were issued from 46 separate Customs offices at a rate of 10,000 to 15,000 a year, and were not binding on anyone other than the parties to the particular transaction. 533 U.S. at 233. Moreover, in *Mead* there was no comparable delegation to the agency of the express authority to interpret the statute. *Id.* at 221-22.

[19] Schuetz's argument that HUD should have followed the procedures necessary to create an "exemption" from Section 8 is misplaced. (Pet. 17-18, 21.) The authority to create additional exemptions from Section 8 liability provided in Section 8(c)(5) in no way clashes with HUD's authority to act pursuant to Section 19(a) to fill in gaps left by Congress in the application of the exemption from liability already set forth in

In *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980), this Court afforded binding deference to an agency interpretation directly analogous to HUD's Policy Statements here. In *Milhollin*, the Court held that Federal Reserve Board staff interpretations of the Truth in Lending Act and its implementing regulations (Regulation Z) were "dispositive" unless "demonstrably irrational." *Id.* at 565. The Court held that "*Congress has conferred special status upon official staff interpretations*," *id.* at 566 n.9, by creating a safe harbor in TILA for a "*good-faith compliance with a* 'rule, regulation, or *interpretation*' " of the Board or its staff. *Id.* at 567 (emphasis added). The Court concluded that the statutory good faith safe harbor, which is materially identical to Section 19(b) of RESPA, "signals an *unmistakable congressional decision to treat administrative* rulemaking and *interpretation under TILA as authoritative*." *Id.* at 567-68 (emphasis added). Like the HUD Policy Statements here, the staff interpretations not only interpreted the statute, but also the Board's own regulations, and thus were particularly entitled to deference. *Id.* at 566 (citing *Seminole Rock*, 325 U.S. at 413-14). "Congress delegated broad administrative lawmaking power to the Federal Reserve Broad when it framed TILA. The Act is best construed by those who gave it substance in promulgating regulations thereunder." *Id.* at 566. The Court pointed out that the Board and its staff are better suited than the courts to make policy judgments about the implementation of TILA given their expertise on complex consumer credit transactions, *see id.* at 559-60, 568-69, which is similar to HUD's expertise on real estate settlement. The Court

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Section 8(c)(2). Moreover, HUD's Policy Statements do not exempt lender payments to brokers from the prohibitions of Section 8. A lender payment to a mortgage broker may still violate Section 8 if HUD's test is not satisfied.

also noted that the staff interpretations were the official position of the Board and were published in the FEDERAL REGISTER, *id.* at 567 & n.10, just as HUD's Policy Statements are here.

Finally, contrary to Schuetz's unsupported assertions (Pet. 16, 17), HUD's test is consistent with RESPA's purpose. RESPA's legislative history makes clear that Section 8 was intended to prohibit payments to parties who perform "no services ... other than placing a telephone call...," S. Rep. No. 93-866 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546, 6551, not payments such as "commissions" (*i.e.*, percentage-based payments) to parties who "perform substantial services" including "all of the work that a branch office ... would otherwise have to perform." *Id.* at 6552. *See id.* at 6556. The legislative history also provides that the "excess of the reasonable value of the ... services performed ... may be considered a kick-back or referral fee proscribed by Section [8]." *Id.* at 6551. By ensuring that mortgage brokers perform a minimum number and type of services and that their compensation is reasonable, HUD's two-part test is consistent with this legislative history and RESPA's ultimate goal of preventing "unnecessarily high" settlement charges. 12 U.S.C. § 2601(a) (Pet. App. 76a). At the same time, HUD's test retains the consumer *benefits* of lender payments to brokers, by ensuring that consumers have the flexibility to reduce up-front costs, thereby fostering homeownership.

In fact, it is Schuetz's interpretation which is contrary to the statute. Schuetz reads Section 8(c) out of the Act and renders lender payments *per se* illegal, which would make it more difficult for millions of Americans to realize the goal of homeownership. *See Glover*, 283 F.3d at 965. Indeed, as the Ninth Circuit recognized, Schuetz focuses almost exclusively on "one element of § 8(a) but does not say anything about § 8(c)(2) or its intersection with § 8(a)." (Pet. App. 16a.)

C. Nor does Schuetz's more extravagant argument—that the Ninth Circuit's opinion below is inconsistent with this Court's decision in *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990)—support the Petition. *Adams Fruit*—now the centerpiece of Schuetz's Petition—was a mere foornote in her reply brief in the court of appeals below. Contrary to Schuetz's assertion, unlike the agency regulation at issue in *Adams Fruit*, HUD's Policy Statements do not encroach upon a statutory private right of action or exceed HUD's congressionally delegated authority. In *Adams Fruit*, this Court held that no deference was due a Department of Labor regulation which prevented injured migrant workers from availing themselves to the private right of action under the Migrant and Seasonal Agricultural Workers Protection Act ("AWPA") if the workers were entitled to state workers' compensation benefits. *See id.* at 649. The Court concluded that the regulation was contrary to the AWPA's provision providing a private right of action, which contained no state exclusivity language. *See id.* The Court held that the agency had no authority to limit the scope of the plain language of the statute's private remedy to injured workers who were not entitled to a remedy under state workers' compensation law. *See id.* at 649-50.

Unlike the agency in *Adams Fruit*, HUD acted squarely within its congressionally delegated authority in issuing its Policy Statements. Indeed, HUD issued the 1999 Policy Statement as a direct result of a congressional command to the Department to clarify the lawfulness of lender payments to mortgage brokers. And unlike the regulation in *Adams Fruit*, HUD's Policy Statements do not interpret or limit who can avail themselves to the private remedy provision found in Section 8(d)(5) of RESPA. Pursuant to HUD's congressionally delegated authority under Section 19(a), and the specific directive in the 1998 House Conference Report, the Policy Statements interpret Sections 8(a) and (c) of RESPA, and set forth the legal standard for evaluating the legality of

lender-paid mortgage broker compensation under those sections. Nor do HUD's Policy Statements interpret Fed. R. Civ. P. 23 on class actions, as Schuetz contends. (Pet. 15, 23.) The mere fact that HUD's two-part test requires a loan-specific analysis of the allegations alleged by Schuetz does not mean that HUD has exceeded its authority. A district court must necessarily look to the applicable liability standard in determining whether claims can be properly adjudicated and managed on a class-wide basis under Rule 23. *See General Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982). The Ninth Circuit simply recognized this unremarkable legal principle.

The other cases cited by Schuetz are distinguishable on the same basis as *Adams Fruit*.[20] *See Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, __, 122 S. Ct. 1155, 1161-62 (2002) (Department of Labor regulation that required employers who failed to provide notice of unpaid leave to either provide 12 additional weeks or face automatic liability under the Family and Medical Leave Act was contrary to the statute and beyond the agency's authority because it relieved employee of statutory burden to prove impairment of rights and resulting prejudice); *SEC v. Sloan*, 436 U.S. 103, 111-17 (1978) (SEC's suspension of trading for more than a year through issuance of a series of consecutive orders suspending trading for 10 days without notice and an opportunity to be heard was contrary to language and structure of the statute

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[20] The courts of appeals decisions cited by Schuetz are also distinguishable on largely the same grounds. *See, e.g., Dantran, Inc. v. United States Dep't of Labor*, 246 F.3d 36 (1st Cir. 2001) (agency determined eligibility for attorney's fees under the Equal Access to Justice Act); *Arapahoe County Pub. Airport Auth. v. FAA*, 242 F.3d 1213 (10th Cir.), *cert. denied*, 122 S. Ct. 664 (2001) (agency determined preclusive effect of state court decision under full faith and credit principals); *Fabil Mfg. Co. v. United States*, 237 F.3d 1335 (Fed. Cir. 2001) (agency established burden of proof in judicial proceedings); *American Airlines, Inc. v. Dep't of Trans.*, 202 F.3d 788 (5th Cir.), *cert. denied*, 530 U.S. 1274 (2000) (same as *Arapahoe County*).

which only authorized Commission to suspend trading for 10 days once for a single violation); *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 744-45 (1973) (Maritime Commission's approval of acquisition agreement for antitrust exemption under the Shipping Act was contrary to clear intent of Congress in statutory scheme and legislative history limiting Commission's jurisdiction to agreements with ongoing responsibilities requiring continuing Commission supervision). Moreover, the decisions cited by Schuetz are readily distinguishable as they involve different statutes with varying substantive provisions, subject matter, congressional intent, and delegations of agency authority, as well as different agency interpretations and expertise; and they analyze distinct competing policy choices.

There is no merit to Schuetz's attempt to expand *Adams Fruit* into a holding that *Chevron* is inapplicable where a statute creates a private right of action. This Court has applied *Chevron* deference to numerous cases which involved private causes of action under federal statutes. *See, e.g.*, *Auer*, 519 U.S. at 457-63 (private action to recover overtime wages under the Fair Labor Standards Act). Schuetz's argument would undermine the national uniformity of federal law, because it would produce different standards of liability depending upon whether the proceeding involved was an agency enforcement action or private litigation. In sum, given that the Ninth Circuit's decision is consistent with the Court's apposite precedent, there is no reason for this Court to exercise its plenary review.

D. Schuetz's request that the Court review whether HUD's Policy Statements are due deference under the Court's opinion in *Skidmore* is plainly without merit. As noted above, the Eighth Circuit in *Glover* held that HUD's Policy Statements were entitled to deference under *Seminole Rock* or, alternatively, under *Skidmore*. Although Banc One presented these same alternative bases for deferring to HUD's Policy Statements below, the Ninth Circuit never reached the issue,

deciding instead to apply *Chevron* deference. Since the court below never addressed *Skidmore* deference, there is clearly no basis for accepting review on that issue. And the fact that the Ninth Circuit did not address the related and alternative grounds for deference under *Seminole Rock* and *Skidmore* also undermines granting review of the *Chevron* question. Simply put, this is neither the right case or time to review the deference question.

Schuetz's *Skidmore* argument (Pet. 22) is wholly premised on the notion that HUD's interpretation of Section 8 has been inconsistent over time. This is mere wishful thinking. HUD's 2001 Policy Statement simply clarified its previous interpretation. "HUD has consistently advised that the issue under RESPA is whether the compensation to a mortgage broker ... is reasonably related to the value of the ... services actually performed." 64 FED. REG. at 10,083 (RA 14a). Nothing in the language of any of the sources cited by Schuetz (Pet. 23-24) remotely conflicts with HUD's current Policy Statements. Schuetz's arguments are rebutted by any fair reading of HUD's Statements themselves, and again provide no basis for this Court's review.

Schuetz's Petition does not even address an alternative reason to defer to HUD's Policy Statements under *Seminole Rock* as HUD's interpretation of its own ambiguous regulations. HUD's 1999 Policy Statement is clearly HUD's interpretation of its own regulations and the 2001 Policy Statement is also an interpretation of HUD's 1999 Policy Statement. The kind of deference set forth in *Seminole Rock* and reaffirmed in *Auer*—that the entity most qualified to clarify an ambiguity in an administrative pronouncement is the entity that promulgated it—also applies fully in this case. HUD is obviously in the best position to clarify its own regulations and Policy Statements. The Petition should be denied.

E. Finally, this case is also a poor vehicle to resolve the issues presented by the Petition. First, the lower courts—including the district court in this case in denying class certification—were with rare exception reaching the same result prior to HUD's Policy Statements. Second, HUD's notice-and-comment regulations provide independent support for the Ninth Circuit decision. HUD's regulations define the term "referral" under Section 8(a) as a payment which "has the effect of *affirmatively influencing* the selection by any person of a provider of a settlement service...." 24 C.F.R. § 3500.14(f)(1) (emphasis added). Banc One argued below (*see* Appellee's C.A. Brief at 45) that the regulation provides an independent basis for awarding summary judgment because it was undisputed that the broker selected Banc One, rather that some other lender, because of factors unrelated to the yield spread premium.[21] (Supp. Exc. at 190.) Indeed, courts have granted summary judgment to wholesale lenders in analogous yield spread premium cases where plaintiffs failed to establish this essential element of a Section 8(a) claim. *See, e.g.*, *Barbosa v. Target Mortgage Corp.*, 968 F. Supp. 1548, 1557-58 (S.D. Fla. 1997). Banc One also argued below (*see* Appellee's C.A. Brief at 53) that the HUD regulation renders class treatment inappropriate because the fact finder would have to examine the reasons that some 700 brokers selected Banc One to fund thousands of putative class member loans. Again, these alternative grounds for the Ninth Circuit opinion undermine the Petition, and demonstrate that this case is not an appropriate vehicle to review the question presented by Schuetz.

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[21] The Ninth Circuit appeared to take note of this undisputed evidence. (*See* Pet. App. 4a ("According to Home Mortgage, loans are selected based on the lender's service, turnaround time, ability to make the required funds available, reputation in the community, level of professionalism, reputation with the banking department, competitive rates, underwriting flexibility, and the availability of products").)

III. THE PETITION DOES NOT PRESENT AN IMPORTANT QUESTION FOR REVIEW.

Contrary to Schuetz's contentions (Pet. 27), the Petition does not present important questions of law or policy which warrant review by this Court. First, as there is no split in the circuit courts on the issues presented, and as the Ninth Circuit's deference analysis is in full accord with this Court's prior precedent, the Petition does not present the kind of case where review is necessary to resolve unsettled jurisprudence.

Schuetz essentially wants the federal courts through piecemeal litigation to make policy judgments about an industry practice—lender paid compensation to mortgage brokers—where that policy judgment has been properly delegated to and resolved by the politically accountable arm of the executive branch. Schuetz implies that consumers would benefit if this case were reviewed and a contrary rule of liability rendering yield spread premiums *per se* illegal were adopted. Not only is this assertion unsupported by the record, it is contrary to explicit findings by HUD. By using yield spread premiums to pay some or all of the compensation to mortgage brokers for their work in originating home mortgage loans, borrowers may (by choice or necessity) limit the amount of up-front cash required to obtain a mortgage loan. As such, yield spread premiums provide consumers with flexibility in structuring mortgage financing transactions which ultimately fosters homeownership.

Finally, Schuetz's assertion that the Ninth Circuit's decision leaves borrowers without a remedy and permits lenders to escape liability is totally unfounded. As the Eighth Circuit pointed out in *Glover,* class-wide relief is not required to ensure that RESPA is properly enforced because "Congress has guaranteed legal representation under RESPA by permitting attorneys fees and costs as part of each allowable recovery." 283 F.3d at 965. As such, "a class action is not necessary for justice to be done." *Id.*

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
24 CFR Part 3500

[Docket No. FR–4450–N–01]

RIN 2502–AH33

Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999–1 Regarding Lender Payments to Mortgage Brokers

AGENCY: Office of the Assistant Secretary for Housing–Federal Housing Commissioner, HUD.

ACTION: Statement of Policy 1999–1.

SUMMARY: This Statement of Policy sets forth the Department of Housing and Urban Development's position on the legality of lender payments to mortgage brokers in connection with federally related mortgage loans under the Real Estate Settlement Procedures Act ("RESPA") and HUD's implementing regulations. While this statement satisfies the Conferees' directive in the Conference Report on the 1999 HUD Appropriations Act that the Department clarify its position on this subject, HUD believes that broad legislative reform along the lines specified in the HUD/Federal Reserve Board Report remains the most effective way to resolve the difficulties and legal uncertainties under RESPA and the Truth in Lending Act (TILA) for industry and consumers alike. Statutory changes like those recommended in the Report would, if adopted, provide the most balanced approach to resolving these contentious issues by providing consumers with better and firmer information about the

costs associated with home-secured credit transactions and providing creditors and mortgage brokers with clearer rules. Such an approach is far preferable to piecemeal actions.

EFFECTIVE DATE: This Statement of Policy is effective March 1, 1999.

FOR FURTHER INFORMATION CONTACT: Rebecca J. Holtz, Director RESPA/ILS Division Room 9146, Department of Housing and Urban Development, Washington, DC 20410; telephone 202-708-4560, or (for legal questions) Kenneth A. Markison, Assistant General Counsel for GSE/RESPA or Rodrigo Alba, Attorney for RESPA, Room 9262, Department of Housing and Urban Development, Washington, DC 20410; telephone 202-708-3137 (these are not toll free numbers). Hearing or speech impaired individuals may access these numbers via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION: This Preamble to the Statement of Policy includes descriptions of current practices in the industry. It is not intended to take positions with respect to the legality or illegality of any practices; such positions are set forth in the Statement of Policy itself.

I. Background

A. General Background

The Conference Report on the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999 (H.R. Conf. Rep. No. 105-769, 105th Cong., 2d Sess. 260 (1998)) (FY 1999 HUD Appropriations Act) directs HUD to clarify its position on lender payments to mortgage brokers within 90 days after the enactment of the FY 1999 HUD Appropriations Act on October 21, 1998. The Report states that "Congress never intended payments by lenders to mortgage brokers for goods or facilities actually furnished or for services actually

performed to be violations of [Sections 8](a) or (b) of the Real Estate Settlement Procedures Act (12 U.S.C. 2601 *et seq.*) (RESPA)]" (*Id.*). The Report also states that the Conferees "are concerned about the legal uncertainty that continues absent such a policy statement" and "expect HUD to work with representatives of industry, Federal agencies, consumer groups, and other interested parties on this policy statement" (*Id.*).

This issue of lender payments, or indirect fees, to mortgage brokers has proven particularly troublesome for industry and consumers alike. It has been the subject of litigation in more than 150 cases nationwide (see additional discussion below). To understand the issue and HUD's position regarding the legality of these payments requires background information concerning the nature of the services provided by mortgage brokers and their compensation, as well as the applicable legal requirements under RESPA.

During the last seven years, HUD has conducted three rulemakings respecting mortgage broker fees. These rulemakings first addressed definitional issues and issues concerning disclosure of payments to mortgage brokers in transactions covered under RESPA. (*See* 57 FR 49600 (November 2, 1992); 60 FR 47650 (September 13, 1995).) Most recently in a regulatory negotiation (see 60 FR 54794 (October 25, 1995) and 60 FR 63008 (December 8, 1995)) and then a proposed rule (62 FR 53912 (October 16, 1997)), HUD addressed the issue of the legality of payments to brokers under RESPA. In the latter, HUD proposed that payments from lenders to mortgage brokers be presumed legal if the mortgage broker met certain specified conditions, including disclosing its role in the transaction and its total compensation through a binding contract with the borrower. This rulemaking is pending.

In July 1998, HUD and the Board of Governors of the Federal Reserve delivered to Congress a joint report con-

taining legislative proposals to reform RESPA and the Truth in Lending Act. If the proposals in this reform package were to be adopted, the disclosure and legality issues raised herein would be resolved for any mortgage broker following certain of the proposed requirements, and consumers would be offered significant new protections.

B. Mortgage Brokerage Industry

When RESPA was enacted in 1974, single family mortgages were largely originated and held by savings and loans, commercial banks, and mortgage bankers. During the 1980's and 1990's, the rise of secondary mortgage market financing resulted in new wholesale and retail entities to compete with the traditional funding entities to provide mortgage financing. This made possible the origination of loans by retail entities that worked with prospective borrowers, collected application information, and otherwise processed the data required to complete the mortgage transaction. These retail entities generally operated with the intent of developing the origination package, and then immediately transmitting it to a wholesale lender who funded the loan. The rise in technology permitted much more effective and faster exchange of information and funds between originators and lenders for the retail transaction.

Entities that provide mortgage origination or retail services and that bring a borrower and a lender together to obtain a loan (usually without providing the funds for loans) are generally referred to as "mortgage brokers." These entities serve as intermediaries between the consumer and the entity funding the loan, and currently initiate an estimated half of all home mortgages made each year in the United States. Mortgage brokers generally fit into two broad categories: those that hold themselves out as representing the borrower in shopping for a loan, and those that simply offer loans as do other retailers of loans. The first type may have an agency relationship with the borrower and, in some states, may be

found to owe a responsibility to the borrower in connection with the agency representation. The second type, while not representing the borrower, may make loans available to consumers from any number of funding sources with which the mortgage broker has a business relationship.

Mortgage brokers provide various services in processing mortgage loans, such as filling out the application, ordering required reports and documents, counseling the borrower and participating in the loan closing. They may also offer goods and facilities, such as reports, equipment, and office space to carry out their functions. The level of services mortgage brokers provide in particular transactions depends on the level of difficulty involved in qualifying applicants for particular loan programs. For example, applicants have differences in credit ratings, employment status, levels of debt, or experience that will translate into various degrees of effort required for processing a loan. Also, the mortgage broker may be required to perform various levels of services under different servicing or processing arrangements with wholesale lenders.

Mortgage brokers vary in their methods of collecting compensation for their work in arranging, processing, and closing mortgage loans. In a given transaction, a broker may receive compensation directly from the borrower, indirectly in fees paid by the wholesaler or lender providing the mortgage loan funds, or through a combination of both.

Where a broker receives direct compensation from a borrower, the broker's fee is likely charged to the borrower at or before closing, as a percentage of the loan amount (*e.g.*, 1% of the loan amount) and through direct fees (such as an application fee, document preparation fee, processing fee, etc.).

Brokers also may receive indirect compensation from lenders or wholesalers. Such indirect fees may be referred to as "back funded payments," "servicing release premiums," or

"yield spread premiums." These indirect fees paid to mortgage brokers may be based upon the interest rate of each loan entered into by the broker with the borrower. These fees have been the subject of much contention and litigation. Another method of indirect compensation, also the subject of significant controversy and uncertainty, is "volume-based" compensation. This generally involves compensation to a mortgage broker by a lender based on the volume of loans that the mortgage broker delivers to the lender in a fixed period of time. The compensation may come in the form of: (1) a cash payment to the broker based on the amount of loans the broker delivers to the lender in excess of a "threshold" or "floor amount"; or (2) provision of a lower "start rate" (often called a discount) for such loans; the compensation to the broker results from the difference in yield between the "start rate" and the loan rate. Volume based compensation may be received at settlement or well after a particular loan has closed.

Payments to brokers by lenders, characterized as yield spread premiums, are based on the interest rate and points of the loan entered into as compared to the par rate offered by the lender to the mortgage broker for that particular loan (e.g., a loan of 8% and no points where the par rate is 7.50% will command a greater premium for the broker than a loan with a par rate of 7.75% and no points).[1] In determining the price of a loan, mortgage brokers rely on rate quotes issued by lenders, sometimes several times a day. When a lender agrees to purchase a loan from a broker, the broker receives the then applicable pricing for the loan based on the difference between the rate reflected in the rate quote and the rate of the loan entered into by the borrower. In some cases, the broker can increase its revenues by arranging a loan with the

[1] The term "par rate" refers to the rate offered to the broker (through the lender's price sheets) at which the lender will fund 100% of the loan with no premiums or discounts to the broker.

consumer at a particular rate and then, based on market changes or other factors which decrease the par rate, increase his or her fees. Some consumers allege that the compensation system for brokers results in higher loan rates for borrowers and/or that this compensation system is illegal under RESPA.

Lender payments to mortgage brokers may reduce the up-front costs to consumers. This allows consumers to obtain loans without paying direct fees themselves.[2] Where a broker is not compensated by the consumer through a direct fee, or is partially compensated through a direct fee, the interest rate of the loan is increased to compensate the broker or the fee is added to principal. In any of the compensation methods described, all costs are ultimately paid by the consumer, whether through direct fees or through the interest rate.

C. Coverage of This Policy Statement

HUD's RESPA rules, found at 24 CFR part 3500 (Regulation X), define a mortgage broker to be "a person (not an employee or exclusive agent of a lender) who brings a borrower and lender together to obtain a federally-related mortgage loan, and who renders * * * 'settlement services'" (24 CFR 3500.2(b)). In table funding, mortgage brokers may process and close loans in their own names. However, at or about the time of settlement, they transfer these loans to the lender, and the lender simultaneously advances the monies to fund the loan. In transactions where mortgage brokers function as intermediaries, the broker also provides loan origination services, but the loan funds are provided by the lender and the loan is closed in the lender's name.

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[2] In many instances, these loans are called "no cost" or "no fee" loans. This terminology, however, may prove confusing because in such cases the costs are still paid by the borrower through a higher interest rate on the loan or by adding fees to principal. HUD's regulations implementing RESPA use the name "no cost" or "no point" loans consistent with industry practice.

In other cases, mortgage brokers may originate and close loans in their own name using their own funds or warehouse lines of credit, and then sell the loans after settlement in the secondary market. In such transactions, mortgage brokers effectively act as lenders under HUD's RESPA rules. Accordingly, the transfer of the loan obligation by, and payment to, these brokers after the initial funding is outside of RESPA's coverage under the secondary market exemption, found at 24 CFR 3500.5(b)(7), which states that payments to and from other loan sources following settlement are exempt from disclosure requirements and Section 8 restrictions. HUD's rule provides that in determining what constitutes a *bona fide* transfer in the secondary market, HUD considers the real source of funding and the real interest of the funding lender. (24 CFR 3500.5(b)(7).)

Because this Statement of Policy focuses on the legality of lender payments to mortgage brokers in transactions subject to RESPA, the coverage of this statement is restricted to payments to mortgage brokers in table-funded and intermediary broker transactions. Lender payments to mortgage brokers where mortgage brokers initially fund the loan and then sell the loan after settlement are outside the coverage of this statement as exempt from RESPA under the secondary market exemption.

D. RESPA and Its Legislative History

In enacting RESPA, Congress sought to protect the American home-buying public from unreasonably and unnecessarily inflated prices in the home purchasing process (S. Rep. No. 93–866 (1974) *reprinted in* 1974 U.S.C.C.A.N. 6548). Section 2 of the Act provides:

> "significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement

process and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country. * * * It is the purpose of this act to effect certain changes in the settlement process for residential real estate that will result— in more effective advance disclosure to home buyers and sellers of settlement costs; [and]

(2) In the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services. * * *" 12 U.S.C. 2601.

Section 4(a) of RESPA requires the Secretary to create a uniform settlement statement which "shall conspicuously and clearly itemize all charges imposed upon the borrower and all charges imposed upon the seller in connection with the settlement" (12 U.S.C. 2603(a)).

Section 5(c) of RESPA requires the provision of a "good faith estimate of the amount or range of charges for specific settlement services the borrower is likely to incur in connection with the settlement as prescribed by the Secretary" (12 U.S.C. 2604(c)).

Section 8(a) of RESPA, prohibits any person from giving and any person from accepting any fee, kickback, or other thing of value pursuant to any agreement or understanding that business shall be referred to any person. (See 12 U.S.C. 2607(a).) Section 8(b) also prohibits anyone from giving or accepting any portion, split, or percentage of any charge made or received for the rendering of a settlement service other than for services actually performed. (12 U.S.C. 2607(b).) Section 8(c) of RESPA provides, however, that nothing in Section 8 shall be construed as prohibiting the payment to any person of a *bona fide* salary or compensation or other payment for goods or facilities actually furnished or services actually performed. (12 U.S.C. 2607(c)(2).)

Under Section 19 of RESPA, HUD is authorized to issue rules, establish exemptions, and make such interpretations as is necessary to implement the law. (12 U.S.C. 2618(a).)

RESPA's legislative history refers to HUD–VA Reports and subsequent hearings by the Housing Subcommittee as defining "major problem areas that [had to] be dealt with if settlement costs are to be kept within reasonable bounds." (S. Rep. No. 93–866, at 6547.) One "major problem area" identified was the "[a]busive and unreasonable practices within the real estate settlement process that increase settlement costs to home buyers without providing any real benefits to them." Another major concern was "[t]he lack of understanding on the part of most home buyers about the settlement process and its costs, which lack of understanding makes it difficult for a free market for settlement services to function at maximum efficiency."

The legislative history reveals that Congress intended RESPA to guard against these unreasonable and excessive settlement costs in two ways. Under Section 4, Congress sought to "mak[e] information on the settlement process available to home buyers in advance of settlement and requir[e] advance disclosures of settlement charges." (S. Rep. 93–866, at 6548.) The Senate Report explained that "home buyers who would otherwise shop around for settlement services, and thereby reduce their overall settlement costs, are prevented from doing so because frequently they are not apprised of the costs of these services until the settlement date or are not aware of the nature of the settlement services that will be provided."

Under Section 8, Congress sought to eliminate what it termed "abusive practices"—kickbacks, referral fees, and unearned fees. In enacting these prohibitions, Congress intended that "the costs to the American home buying public will not be unreasonably or unnecessarily inflated." (S. Rep. 93-866 at 6548.) In describing the Section 8 provisions, the

Senate Report explained that RESPA "is intended to prohibit all * * * referral fee arrangements whereby any payment is made or 'thing of value' is provided for the referral of real estate settlement business." (S. Rep. 93–866, at 6551.)

The legislative history adds that "[t]o the extent the payment is in excess of the reasonable value of the goods provided or services performed, the excess may be considered a kickback or referral fee proscribed by Section [8]." (S. Rep. 93-866, at 6551.) The Senate Report states that "reasonable payments in return for services actually performed or goods actually furnished" were not intended to be prohibited (Id).[3] It also provided that "[t]hose persons and companies that provide settlement services should therefore take measures to ensure that any payments they make or commissions they give are not out of line with the reasonable value of the services received." (*Id.*)

The Department has consistently held that the prohibitions under Section 8 of RESPA cover the activities of mortgage brokers, because RESPA applies to the origination, processing, and funding of a federally related mortgage loan. This became an issue when, in 1984, the 6th Circuit Court of Appeals held that in applying Section 8 as a criminal statute, the definition of settlement services did not clearly extend to the making of a mortgage loan. (*U.S.* versus *Graham Mortgage Corp.*, 740 F.2d 414 (6th Cir. 1984).) In 1992, Congress responded by amending RESPA to remove any doubt that, for purposes of RESPA, a settlement service includes the origination and making of a mortgage loan.

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[3] One of the examples of abusive activities listed in the legislative history that RESPA was intended to remedy is "a title insurance company [that] may give 10% or more of the title insurance premium to an attorney who may perform no services for the title insurance company other than placing a telephone call to the company or filling out a simple application." (S. Rep. 93-866, at 6551.) Accordingly, where insufficient services are provided, RESPA is intended to prohibit payment.

(Section 908 of the Housing and Community Development Act of 1992 (Pub. L. 102–550, approved October 28, 1992; 104 Stat. 4413). At the same time, Congress also specifically made RESPA applicable to second mortgages and refinancings. (*Id.*)

E. HUD's RESPA Rules

On November 2, 1992 (57 FR 49600), the Department issued a major revision of Regulation X, the rule interpreting RESPA. The rule defined the term "mortgage broker" for the first time. Under the rule, mortgage brokers are required to disclose direct and indirect payments on the Good Faith Estimate (GFE) no later than 3 days after loan application. (See 24 CFR 3500.7(a) and (c).) Such disclosure must also be provided to consumers, as a final figure, at closing on the settlement statement. (24 CFR 3500.8; 24 CFR part 3500, Appendix A (Instructions for Filling Out the HUD-1 and HUD-1A).) On the GFE and the settlement statement, lenderpaid mortgage broker fees must be shown as "Paid Outside of Closing" (P.O.C.), and not computed in arriving at totals. (See 24 CFR 3500.7(a)(2) and 24 CFR part 3500, Appendix A.) The 1992 rule treats mortgage brokers as settlement service providers whose fees are disbursed at or before settlement, akin to title agents, attorneys, appraisers, etc., whose fees are subject to disclosure and otherwise subject to RESPA, including Section 8.

The 1992 rule did not explicitly take a position on whether yield spread premiums or any other named class of back-funded or indirect fees paid by lenders to brokers are *per se* legal or illegal. By illustration, codified as Illustrations of Requirements of RESPA, Fact Situations 5 and 12 in Appendix B to 24 CFR part 3500, the 1992 rule specifically listed "servicing release premiums" and "yield spread premiums" as fees required to be itemized on the settlement statement. Although the 1992 rule specifically acknowledged the existence of such fees and provided illustrations of how

they were to be denominated on HUD disclosure forms, this requirement was intended to ensure their disclosure, but not to create a presumption of *per se* legality or illegality.

The anti-kickback, anti-referral fee and unearned fee provisions of RESPA are implemented by 24 CFR 3500.14. Regulation X repeats the Section 8 prohibitions against compensation for the referral of settlement service business and for the giving or accepting of any portion, split or percentage of any charge other than for services actually rendered. (24 CFR 3500.14(c).) Regulation X provides that a charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates the unearned fee prohibition. (See 24 CFR 3500.14(c).) Moreover, 24 CFR 3500.14(g)(1)(iv) clarifies that Section 8 of RESPA permits "[a] payment to any person of a *bona fide* salary or compensation or other payment for goods or facilities actually furnished or for services actually performed."

The Department's regulations provide, under 24 CFR 3500.14(g)(2), that:

> The Department may investigate high prices to see if they are the result of a referral fee or a split of a fee. *If the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods actually performed or provided.* These facts may be used as evidence of a violation of section 8 and may serve as a basis for a RESPA investigation. High prices standing alone are not proof of a RESPA violation. The value of a referral (i.e., the value of any additional business obtained thereby) is not to be taken into account in determining whether the payment exceeds the reasonable value of such goods, facilities or services. * * * (emphasis supplied).

In addition, Regulation X clarifies that "[w]hen a person in a position to refer settlement service business * * * receives a payment for providing additional settlement services as part of a real estate transaction, such payment must be for services that are actual, necessary and distinct from the primary services provided by such person." (24 CFR 3500.14(g)(3).)

Since 1992, HUD has provided various interpretations and other issuances under these rules stating the Department's position that the legality of a payment to a mortgage broker is not premised on the name of the particular fee. Rather, HUD has consistently advised that the issue under RESPA is whether the compensation to a mortgage broker in covered transactions is reasonably related to the value of the goods or facilities actually furnished or services actually performed. If the compensation, or a portion thereof, is not reasonably related to the goods or facilities actually furnished or the services actually performed, there is a compensated referral or an unearned fee in violation of Section 8(a) or 8(b) of RESPA, whether the compensation is a direct or indirect payment or a combination thereof.

F. Recent HUD Rulemaking Efforts

The Department received comments on the 1992 rule's requirement that mortgage brokers disclose indirect payments from lenders on the GFE and the settlement statement. In response, the Department reviewed whether the disclosure of indirect or back-funded fees is necessary or in the borrower's interest and whether additional rulemaking was needed to clarify the legality of fees to mortgage brokers. Brokers had alleged that these disclosures were confusing to consumers and disadvantaged brokers as compared to other originators who were within the secondary market exemption and were not required to disclose their compensation for the subsequent sale of the loan. Consumer representatives said that consumers needed to understand the existence of indirect fees and whether brokers represented consumers in shopping for

loans. On September 13, 1995, the Department issued a proposed rule (60 FR 47650) and in December 1995 through May 1996, embarked on a negotiated rulemaking on these subjects.

Although the negotiated rulemaking did not result in consensus, on October 16, 1997, HUD published a proposed rule (62 FR 53912) that was shaped by views from both industry and consumer representatives provided during the negotiated rulemaking (as well as by comments received from the September 13, 1995, proposed rule (60 FR 47650)). The 1997 proposed rule proposed a qualified "safe harbor" for payments to mortgage brokers under Section 8. Under the proposal, if a broker enters into a contract with consumers explaining the broker's functions (whether or not it represented the consumer) and the total compensation the broker would receive in the transaction, before the consumer applied for a loan, HUD would presume the broker fees, both direct and indirect, to be legal. The 1997 proposal also provided, however, that this qualified safe harbor would only be available to those payments that did not exceed a test, to be established in the rulemaking, to preclude unreasonable fees. This proposal was intended, among other things, to establish that yield spread premiums paid to brokers meeting the rule's requirements were presumed legal when brokers provided consumers with prescribed information concerning the functions and compensation of mortgage brokers. The Department has received over 9,000 comments in response to this proposed rule.

G. Litigation

During the last several years, more than 150 lawsuits have been brought seeking class action certification based in whole or in part on the theory that the making of indirect payments from lenders to mortgage brokers violates Section 8 of RESPA. In various cases, plaintiffs have argued that yield spread premiums or other denominated indirect payments to

brokers, regardless of their amount, constitute prohibited referral fees under Section 8(a). These plaintiffs generally argue that yield spread premiums are payments based upon the broker's ability to deliver a loan that is above the par rate. Some lawsuits have alleged that such yield spread premiums or other indirect payments are a split of fees between the lender and the broker, or are simply unearned fees and, therefore, also violate Section 8(b) of RESPA. Other challenges rely, in part, on the alleged unreasonableness of brokers' fees. These complaints assert that under the RESPA regulations, payments must bear a reasonable relationship to the market value of the good or the service provided and that payments in excess of such amounts must be regarded as forbidden referral fees.

Many of the lawsuits involve allegations that consumers were not informed by mortgage brokers concerning the mortgage brokers' role and compensation. A common element in many allegations is that borrowers were not informed about the existence or the amount of the yield spread premiums paid to the mortgage broker, and the relationship of the yield spread premium to the direct fees that the borrower paid. The facts in these cases suggest generally that even where there were proper disclosures on the GFE and the settlement statement, borrowers allege that they were unaware of, or did not understand, that a yield spread premium was tied to the interest rate they agreed to pay, and that they could have reduced this charge or their direct payment to the broker either by further negotiation or by engaging in additional shopping among mortgage loan providers.

Courts have been split in their decisions on these cases. Some of the decisions have concluded that yield spread premiums may be prohibited referral fees or duplicative fees in contravention of Section 8 of RESPA under the specific facts of the case. Some have held that the permissibility of

yield spread premiums must be based on an analysis of whether the premiums constitute a reasonable payment, either alone or in combination with any direct fee paid by the borrower, for either the goods, services or facilities actually furnished. Because some courts have found that this necessitates an individual analysis of the facts of each transaction, some courts have denied plaintiffs' requests for class action certification. Some courts have certified a class without reaching a conclusion on the RESPA issues. Others have held that yield spread premiums constitute valid consideration to the mortgage broker in exchange for the origination of the loan and the sale of the loan to the lender. These courts have found that the payment of yield spread premiums is one method among many of compensating the broker for the origination services rendered.

H. Reform

In July 1998, the Department and the Federal Reserve Board delivered a report to Congress recommending significant improvements to streamline and simplify current RESPA and Truth In Lending Act requirements. The Report proposed that along with a tighter and more enforceable scheme for providing consumers with estimated costs for settlements, an exemption from Section 8's prohibitions should be established for those entities that offer a package of settlement services and a mortgage loan at a guaranteed price, rate and points for the package early in the consumer's process of shopping for a loan. Such an approach, which also includes other additional consumer protection recommendations, would largely resolve these issues for any mortgage broker who chooses to abide by the requirements of this exemption. The Report's consumer protection recommendations included, among other items, that Congress consider establishment of an unfair and deceptive acts and practices remedy under the "packaging" proposal set forth in the Report, settlement costs would be controlled more effectively

by market forces. Consumers would be better able to comparison-shop, thereby encouraging creditors and others to operate efficiently and pass along discounts and lower prices. In addition, the Report's recommendations would greatly simplify compliance for the industry and clarify legal uncertainties that create liability risks.

I. This Policy Statement

This policy statement provides HUD's views of the legality of fees to mortgage brokers from lenders under existing law. In accordance with the Conference Report, in developing this policy statement, HUD met with representatives of government agencies, as well as a broad range of consumer and industry groups, including the Office of Thrift Supervision, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Federal Reserve Board, the National Association of Mortgage Brokers, the Mortgage Bankers Association of America, the American Bankers Association, the Consumer Mortgage Coalition, America's Community Bankers, the Consumer Bankers Association, the Independent Bankers Association of America, AARP, the National Consumer Law Center, Consumers Union, and the National Association of Consumer Advocates.

II. RESPA Policy Statement 1999-1

A. Introduction

The Department hereby states its position on the legality of payments by lenders to mortgage brokers under the Real Estate Settlement Procedures Act (12 U.S.C. 2601 *et seq.*) (RESPA) and its implementing regulations at 24 CFR part 3500 (Regulation X). This Statement of Policy is issued pursuant to Section 19(a) of RESPA (12 U.S.C. 2617(a)) and 24 CFR 3500.4(a)(1)(ii). HUD is cognizant of the Conferees' statement in the Conference Report on the FY 1999 HUD Appropriations Act that "Congress never intended payments by lenders to mortgage brokers for goods or facilities actually

furnished or for services actually performed to be violations of [Sections 8](a) or (b) (12 U.S.C. Sec. 2607) in its enactment of RESPA." (H. Rep. 105–769, at 260.) The Department is also cognizant of the congressional intent in enacting RESPA of protecting consumers from unnecessarily high settlement charges caused by abusive practices. (12 U.S.C. 2601.)

In transactions where lenders make payments to mortgage brokers, HUD does not consider such payments (i.e., yield spread premiums or any other class of named payments), to be illegal *per se*. HUD does not view the name of the payment as the appropriate issue under RESPA. HUD's position that lender payments to mortgage brokers are not illegal *per se* does not imply, however, that yield spread premiums are legal in individual cases or classes of transactions. The fees in cases or classes of transactions are illegal if they violate the prohibitions of Section 8 of RESPA.

In determining whether a payment from a lender to a mortgage broker is permissible under Section 8 of RESPA, the first question is whether goods or facilities were actually furnished or services were actually performed for the compensation paid. The fact that goods or facilities have been actually furnished or that services have been actually performed by the mortgage broker does not by itself make the payment legal. The second question is whether the payments are reasonably related to the value of the goods or facilities that were actually furnished or services that were actually performed.

In applying this test, HUD believes that total compensation should be scrutinized to assure that it is reasonably related to goods, facilities, or services furnished or performed to determine whether it is legal under RESPA. Total compensation to a broker includes direct origination and other fees paid by the borrower, indirect fees, including those that are derived from the interest rate paid by the borrower, or a

combination of some or all. The Department considers that higher interest rates alone cannot justify higher total fees to mortgage brokers. All fees will be scrutinized as part of total compensation to determine that total compensation is reasonably related to the goods or facilities actually furnished or services actually performed. HUD believes that total compensation should be carefully considered in relation to price structures and practices in similar transactions and in similar markets.

B. Scope

In light of 24 CFR § 3500.5(b)(7), which exempts from RESPA coverage *bona fide* transfers of loan obligations in the secondary market, this policy statement encompasses only transactions where mortgage brokers are not the real source of funds (*i.e.*, tablefunded transactions or transactions involving "intermediary" brokers). In table-funded transactions, the mortgage broker originates, processes and closes the loan in the broker's own name and, at or about the time of settlement, there is a simultaneous advance of the loan funds by the lender and an assignment of the loan to that lender. (See 24 CFR 3500.2 (Definition of "table funding").) Likewise, in transactions where mortgage brokers are intermediaries, the broker provides loan origination services and the loan funds are provided by the lender; the loan, however, is closed in the lender's name.

C. Payments Must Be for Goods, Facilities or Services

In the determination of whether payments from lenders to mortgage brokers are permissible under Section 8 of RESPA, the threshold question is whether there were goods or facilities actually furnished or services actually performed for the total compensation paid to the mortgage broker. In making the determination of whether compensable services are performed, HUD's letter to the Independent Bankers Association of America, dated February 14, 1995 (IBAA letter) may

be useful. In that letter, HUD identified the following services normally performed in the origination of a loan:

(a) Taking information from the borrower and filling out the application; [4]

(b) Analyzing the prospective borrower's income and debt and prequalifying the prospective borrower to determine the maximum mortgage that the prospective borrower can afford;

(c) Educating the prospective borrower in the home buying and financing process, advising the borrower about the different types of loan products available, and demonstrating how closing costs and monthly payments could vary under each product;

(d) Collecting financial information (tax returns, bank statements) and other related documents that are part of the application process;

(e) Initiating/ordering VOEs (verifications of employment) and VODs (verifications of deposit);

(f) Initiating/ordering requests for mortgage and other loan verifications;

(g) Initiating/ordering appraisals;

(h) Initiating/ordering inspections or engineering reports;

(i) Providing disclosures (truth in lending, good faith estimate, others) to the borrower;

(j) Assisting the borrower in understanding and clearing credit problems;

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[4] In a subsequent informal interpretation, dated June 20, 1995, HUD stated that the filling out of a mortgage loan application could be substituted by a comparable activity, such as the filling out of a borrower's worksheet.

(k) Maintaining regular contact with the borrower, realtors, lender, between application and closing to appraise them of the status of the application and gather any additional information as needed;

(l) Ordering legal documents;

(m) Determining whether the property was located in a flood zone or ordering such service; and

(n) Participating in the loan closing.

While this list does not exhaust all possible settlement services, and while the advent of computer technology has, in some cases, changed how a broker's settlement services are performed, HUD believes that the letter still represents a generally accurate description of the mortgage origination process. For other services to be acknowledged as com pensable under RESPA, they should be identifiable and meaningful services akin to those identified in the IBAA letter including, for example, the operation of a computer loan origination system (CLO) or an automated underwriting system (AUS).

The IBAA letter provided guidance on whether HUD would take an enforcement action under RESPA. In the context of the letter's particular facts and subject to the reasonableness test which is discussed below, HUD articulated that it generally would be satisfied that sufficient origination work was performed to justify compensation if it found that:

- The lender's agent or contractor took the application information (under item (a)); and
- The lender's agent or contractor performed at least five additional items on the list above.

In the letter and in the context of its facts, HUD also pointed out that it is concerned that a fee for steering a customer to a particular lender could be disguised as compensation for "counseling-type" activities. Therefore, the

letter states that if an agent or contractor is relying on taking the application and performing only "counseling type" services—(b), (c), (d), (j), and (k) on the list above—to justify its fee, HUD would also look to see that meaningful counseling—not steering—is provided. In analyzing transactions addressed in the IBAA letter, HUD said it would be satisfied that no steering occurred if it found that:

- Counseling gave the borrower the opportunity to consider products from at least three different lenders;
- The entity performing the counseling would receive the same compensation regardless of which lender's products were ultimately selected; *and*
- Any payment made for the "counseling-type" services is reasonably related to the services performed and not based on the amount of loan business referred to a particular lender.

In examining services provided by mortgage brokers and payments to mortgage brokers, HUD will look at the types of origination services listed in the IBAA letter to help determine whether compensable services are performed.[5] However, the IBAA letter responded to a program where a relatively small fee was to be provided for limited services by lenders that were brokering loans.[6]

Accordingly, the formulation in the IBAA letter of the number of origination services which may be required to be performed for compensation is not dispositive in analyzing

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[5] In the June 20, 1995 letter, the Department clarified that the counseling test in the IBAA letter would not apply if an entity performed only noncounseling services (a, e, f, g, h, i, l, m, n) or a mix of counseling and non-counseling services (but did not rely only on the five counseling services (b, c, d, j, and k)).

[6] In the particular program reviewed by HUD in the IBAA letter, the average total compensation for performing six of the origination services listed above was below $200.

more costly mortgage broker transactions where more comprehensive services are provided. The determinative test under RESPA is the relationship of the services, goods or facilities furnished to the total compensation received by the broker (discussed below). In addition to services, mortgage brokers may furnish goods or facilities to the lender. For example, appraisals, credit reports, and other documents required for a complete loan file may be regarded as goods, and a reasonable portion of the broker's retail or "store-front" operation may generally be regarded as a facility for which a lender may compensate a broker. However, while a broker may be compensated for goods or facilities actually furnished or services actually performed, the loan itself, which is arranged by the mortgage broker, cannot be regarded as a "good" that the broker may sell to the lender and that the lender may pay for based upon the loan's yield's relation to market value, reasonable or otherwise. In other words, in the context of a non-secondary market mortgage broker transaction, under HUD's rules, it is not proper to argue that a loan is a "good," in the sense of an instrument bearing a particular yield, thus justifying any yield spread premium to the mortgage broker, however great, on the grounds that such yield spread premium is the "market value" of the good.

D. Compensation Must Be Reasonably Related to Value of Goods, Facilities or Services

The fact that goods or facilities have been actually furnished or that services have been actually performed by the mortgage broker, as described in the IBAA letter, does not by itself make a payment by a lender to a mortgage broker legal. The next inquiry is whether the payment is reasonably related to the value of the goods or facilities that were actually furnished or services that were actually performed. Although RESPA is not a rate-making statute, HUD is authorized to ensure that payments from lenders to mortgage brokers are reasonably related to the value of the goods or

facilities actually furnished or services actually performed, and are not compensation for the referrals of business, splits of fees or unearned fees.

In analyzing whether a particular payment or fee bears a reasonable relationship to the value of the goods or facilities actually furnished or services actually performed, HUD believes that payments must be commensurate with that amount normally charged for similar services, goods or facilities. This analysis requires careful consideration of fees paid in relation to price structures and practices in similar transactions and in similar markets.[7] If the payment or a portion thereof bears no reasonable relationship to the market value of the goods, facilities or services provided, the excess over the market rate may be used as evidence of a compensated referral or an unearned fee in violation of Section 8(a) or (b) of RESPA. (See 24 CFR 3500.14(g)(2).) Moreover, HUD also believes that the market price used to determine whether a particular payment meets the reasonableness test may not include a referral fee or unearned fee, because such fees are prohibited by RESPA. Congress was clear that for payments to be legal under Section 8, they must bear a reasonable relationship to the value received by the person or company making the payment. (S. Rep. 93–866, at 6551.)

The Department recognizes that some of the goods or facilities actually furnished or services actually performed by the broker in originating a loan are "for" the lender and other goods or facilities actually furnished or services actually performed are "for" the borrower. HUD does not believe that it is necessary or even feasible to identify or allocate which

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[7] HUD recognizes that settlement costs may vary in different markets. The cost of a specific service in Omaha, Nebraska, for example, may bear little resemblance to the cost of a similar service in Los Angeles, California.

facilities, goods or services are performed or provided for the lender, for the consumer, or as a function of State or Federal law. All services, goods and facilities inure to the benefit of both the borrower and the lender in the sense that they make the loan transaction possible (e.g., an appraisal is necessary to assure that the lender has adequate security, as well as to advise the borrower of the value of the property and to complete the borrower's loan).

The consumer is ultimately purchasing the total loan and is ultimately paying for all the services needed to create the loan. All compensation to the broker either is paid by the borrower in the form of fees or points, directly or by addition to principal, or is derived from the interest rate of the loan paid by the borrower. Accordingly, in analyzing whether lender payments to mortgage brokers comport with the requirements of Section 8 of RESPA, HUD believes that the totality of the compensation to the mortgage broker for the loan must be examined. For example, if the lender pays the mortgage broker $600 and the borrower pays the mortgage broker $500, the total compensation of $1,100 would be examined to determine whether it is reasonably related to the goods or facilities actually furnished or services actually performed by the broker.

Therefore, in applying this test, HUD believes that total compensation should be scrutinized to assure that it is reasonably related to goods, facilities, or services furnished or performed to determine whether total compensation is legal under RESPA. Total compensation to a broker includes direct origination and other fees paid by the borrower, indirect fees, including those that are derived from the interest rate paid by the borrower, or a combination of some or all. All payments, including payments based upon a percentage of the loan amount, are subject to the reasonableness test defined above. In applying this test, the Department considers that higher interest rates alone cannot justify higher total fees to

mortgage brokers. All fees will be scrutinized as part of total compensation to determine that total compensation is reasonably related to the goods or facilities actually furnished or services actually performed. In so-called "no-cost" loans, borrowers accept a higher interest rate in order to reduce direct fees, and the absence of direct payments to the mortgage broker is made up by higher indirect fees (e.g., yield spread premiums). Higher indirect fees in such arrangements are legal if, and only if, the total compensation is reasonably related to the goods or facilities actually furnished or services actually performed.

In so-called "no-cost" loans, borrowers accept a higher interest rate in order to reduce direct fees, and the absence of direct payments to the mortgage broker is made up by higher indirect fees (e.g., yield spread premiums). Higher indirect fees in such arrangements are legal if, and only if, the total compensation is reasonably related to the goods or facilities actually furnished or services actually performed.

In determining whether the compensation paid to a mortgage broker is reasonably related to the goods or facilities actually furnished or services actually performed, HUD will consider all compensation, including any volume based compensation. In this analysis, there may be no payments merely for referrals of business under Section 8 of RESPA. (See 24 CFR 3500.14.)[8]

Under HUD's rules, when a person in a position to refer settlement service business receives a payment for providing additional settlement services as part of the transaction, such payment must be for services that are actual, necessary and distinct from the primary services provided by the person. (24

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[8] The Department generally has held that when the payment is based on the volume or value of business transacted, it is evidence of an agreement for the referral of business (unless, for example, it is shown that payments are for legitimate business reasons unrelated to the value of the referrals). (*See* 24 CFR 3500.14(e).)

CFR 3500.14(g)(3).) While mortgage brokers may receive part of their compensation from a lender, where the lender payment duplicates direct compensation paid by the borrower for goods or facilities actually furnished or services actually performed, Section 8 is violated. In light of the fact that the borrower and the lender may both contribute to some items, HUD believes that it is best to evaluate seemingly duplicative fees by analyzing total compensation under the reasonableness test described above.

E. Information Provided to Borrower

Under current RESPA rules mortgage brokers are required to disclose estimated direct and indirect fees on the Good Faith Estimate (GFE) no later than 3 days after loan application. (See 24 CFR 3500.7(a) and (b).) Such disclosure must also be provided to consumers, as a final exact figure, at closing on the settlement statement. (24 CFR 3500.8; 24 CFR part 3500, Appendix A.) On the GFE and the settlement statement, lender payments to mortgage brokers must be shown as "Paid Outside of Closing" (P.O.C.), and are not computed in arriving at totals. (24 CFR 3500.7(a)(2).) The requirement that all fees be disclosed on the GFE is intended to assure that consumers are shown the full amount of compensation to brokers and others early in the transaction.

The Department has always indicated that any fees charged in settlement transactions should be clearly disclosed so that the consumer can understand the nature and recipient of the payment. Code-like abbreviations like "YSP to DBG, POC", for instance, have been noted.[9] Also, the Department

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[9] This is an example only. HUD recognizes that current practices may leave borrowers confused. However, the use of any particular terms, including abbreviations, may not, by itself, violate RESPA. Nevertheless, going forward, HUD recommends that the disclosures on the GFE and the settlement statement be as described in the text. HUD recognizes that system changes may require time for lenders and brokers to implement.

has seen examples on the GFE and/or the settlement statement where the identity and/or purpose of the fees are not clearly disclosed.

The Department considers unclear and confusing disclosures to be contrary to the statute's and the regulation's purposes of making RESPA-covered transactions understandable to the consumer. At a minimum, all fees to the mortgage broker are to be clearly labeled and properly estimated on the GFE. On the settlement statement, the name of the recipient of the fee (in this case, the mortgage broker) is to be clearly labeled and listed, and the fee received from a lender is to be clearly labeled and listed in the interest of clarity. For example, a fee would be appropriately disclosed as "Mortgage broker fee from lender to XYZ Corporation (P.O.C.)." In the interest of clarity, other fees or payments from the borrower to the mortgage broker should identify that they are mortgage broker fees from the borrower.[10]

There is no requirement under existing law that consumers be fully informed of the broker's services and compensation prior to the GFE. Nevertheless, HUD believes that the broker should provide the consumer with information about the broker's services and compensation, and agreement by the consumer to the arrangement should occur as early as possible in the process. Mortgage brokers and lenders can improve their ability to demonstrate the reasonableness of their fees if the broker discloses the nature of the broker's services and the various methods of compensation at the time the consumer first discusses the possibility of a loan with the broker.

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[10] HUD recognizes that current software may not currently accommodate these additional disclosures. Both industry and consumers would be better served if these additional disclosures were included in future forms.

The legislative history makes clear that RESPA was not intended to be a rate-setting statute and that Congress instead favored a market-based approach. (S. Rep. No. 93-866 at 6546 (1974).) In making the determination of whether a payment is *bona fide* compensation for goods or facilities actually furnished or services actually performed, HUD has, in the past, indicated that it would examine whether the price paid for the goods, facilities or services is truly a market price; that is, if in an arm's length transaction a purchaser would buy the services at or near the amount charged. If the fee the consumer pays is disclosed and agreed to, along with its relationship to the interest rate and points for the loan and any lender-paid fees to the broker, a market price for the services, goods or facilities could be attained. HUD believes that for the market to work effectively, borrowers should be afforded a meaningful opportunity to select the most appropriate product and determine what price they are willing to pay for the loan based on disclosures which provide clear and understandable information.

The Department reiterates its longstanding view that disclosure alone does not make illegal fees legal under RESPA. On the other hand, while under current law, pre-application disclosure to the consumer is not required, HUD believes that fuller information provided at the earliest possible moment in the shopping process would increase consumer satisfaction and reduce the possibility of misunderstanding.

HUD commends the National Association of Mortgage Brokers and the Mortgage Bankers Association of America for strongly suggesting that their members furnish consumers with a form describing the function of mortgage brokers and stating that a mortgage broker may receive a fee in the transaction from a lender.

Although this statement of policy does not mandate disclosures beyond those currently required by RESPA and Regulation X, the most effective approach to disclosure

would allow a prospective borrower to properly evaluate the nature of the services and all costs for a broker transaction, and to agree to such services and costs before applying for a loan. Under such an approach, the broker would make the borrower aware of whether the broker is or is not serving as the consumer's agent to shop for a loan, and the total compensation to be paid to the mortgage broker, including the amounts of each of the fees making up that compensation. If indirect fees are paid, the consumer would be made aware of the amount of these fees and their relationship to direct fees and an increased interest rate. If the consumer may reduce the interest rate through increased fees or points, this option also would be explained. HUD recognizes that in many cases, the industry has not been using this approach because it has not been required. Moreover, new methods may require time to implement. HUD encourages these efforts going forward and believes that if these desirable disclosure practices were adhered to by all industry participants, the need for more prescriptive regulatory or legislative actions concerning this specific problem could be tempered or even made unnecessary.

While the Department is issuing this statement of policy to comply with a Congressional directive that HUD clarify its position on the legality of lender payments to mortgage brokers, HUD agrees with segments of the mortgage lending and settlement service industries and consumer representatives that legislation to improve RESPA is needed. HUD believes that broad legislative reform along the lines specified in the HUD/Federal Reserve Board Report remains the most effective way to resolve the difficulties and legal uncertainties under RESPA and TILA for industry and consumers alike. Statutory changes like those recommended in the Report would, if adopted, provide the most balanced approach to resolving these contentious issues by providing consumers with better and firmer information about the costs associated

with home-secured credit transactions and providing creditors and mortgage brokers with clearer rules.

III. Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this Statement of Policy under Executive Order 12866, *Regulatory Planning and Review*. OMB determined that this Statement of Policy is a "significant regulatory action," as defined in section 3(f) of the Order (although not economically significant, as provided in section 3(f)(1) of the Order). Any changes made to the Statement of Policy subsequent to its submission to OMB are identified in the docket file, which is available for public inspection in the office of the Department's Rules Docket Clerk, Room 10276, 451 Seventh Street, SW, Washington, DC 20410-0500.

Dated: February 22, 1999.

William C. Apgar,
Assistant Secretary for Housing-Federal Housing Commissioner.

[FR Doc. 99-4921 Filed 2–26–99; 8:45 am]

APPENDIX B

DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
24 CFR Part 3500

[Docket No. FR–4714–N–01]

RIN 2502–AH74

Real Estate Settlement Procedures Act Statement of Policy 2001-1:

Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b)

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Statement of Policy 2001–1.

SUMMARY: This Statement of Policy is being issued to eliminate any ambiguity concerning the Department's position with respect to those lender payments to mortgage brokers characterized as yield spread premiums and to overcharges by settlement service providers as a result of questions raised by two recent court decisions, *Culpepper* v. *Irwin Mortgage Corp.* and *Echevarria* v. *Chicago Title and Trust Co.*, respectively. In issuing this Statement of Policy, the Department clarifies its interpretation of Section 8 of the Real Estate Settlement Procedures Act (RESPA) in Statement of Policy 1999–1 Regarding Lender Payments to Mortgage Brokers (the 1999 Statement of Policy), and reiterates its long-standing interpretation of Section 8(b)'s prohibitions. *Culpepper* v. *Irwin Mortgage Corp.* involved the payment of yield spread premiums from lenders to mortgage brokers. *Echevarria* v. *Chicago Title and Trust Co.* involved the

applicability of Section 8(b) to a settlement service provider that overcharged a borrower for the service of another settlement service provider, and then retained the amount of the overcharge.

Today's Statement of Policy reiterates the Department's position that yield spread premiums are not per se legal or illegal, and clarifies the test for the legality of such payments set forth in HUD's 1999 Statement of Policy. As stated there, HUD's position that lender payments to mortgage brokers are not illegal per se does not imply, however, that yield spread premiums are legal in individual cases or classes of transactions. The legality of yield spread premiums turns on the application of HUD's test in the 1999 Statement of Policy as clarified today.

The Department also reiterates its long-standing position that it may violate Section 8(b) and HUD's implementing regulations: (1) For two or more persons to split a fee for settlement services, any portion of which is unearned; or (2) for one settlement service provider to mark-up the cost of the services performed or goods provided by another settlement service provider without providing additional actual, necessary, and distinct services, goods, or facilities to justify the additional charge; or (3) for one settlement service provider to charge the consumer a fee where no, nominal, or duplicative work is done, or the fee is in excess of the reasonable value of goods or facilities provided or the services actually performed.

This Statement of Policy also reiterates the importance of disclosure so that borrowers can choose the best loan for themselves, and it describes disclosures HUD considers best practices. The Secretary is also announcing that he intends to make full use of his regulatory authority to establish clear requirements for disclosure of mortgage broker fees and to improve the settlement process for lenders, mortgage brokers, and consumers.

EFFECTIVE DATE: October 18, 2001.

FOR FURTHER INFORMATION CONTACT: Ivy M. Jackson, Acting Director, RESPA/ILS Division, Room 9156, U.S. Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone (202) 708-0502, or (for legal questions) Kenneth A. Markison, Assistant General Counsel for GSE/RESPA, Room 9262, Department of Housing and Urban Development, Washington, DC 20410; telephone (202) 708-3137 (these are not toll-free numbers). Persons who have difficulty hearing or speaking may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

General Background

The Department is issuing this Statement of Policy in accordance with 5 U.S.C. 552 as a formal pronouncement of its interpretation of relevant statutory and regulatory provisions. Section 19(a) (12 U.S.C. 2617(a)) of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2601-2617) (RESPA) specifically authorizes the Secretary "to prescribe such rules and regulations [and] to make such interpretations * * * as may be necessary to achieve the purposes of [RESPA]."

Section 8(a) of RESPA prohibits any person from giving and any person from accepting "any fee, kickback, or thing of value pursuant to an agreement or understanding, oral or otherwise" that real estate settlement service business shall be referred to any person. See 12 U.S.C. 2607(a). Section 8(b) prohibits anyone from giving or accepting "any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service * * * other than for services actually performed." 12 U.S.C. 2607(b). Section 8(c) of RESPA provides, "Nothing in [Section 8] shall be construed as prohibiting * * * (2) the payment to any person

of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed * * *" 12 U.S.C. 2607(c)(2). RESPA also requires the disclosure of settlement costs to consumers at the time of or soon after a borrower applies for a loan and again at the time of real estate settlement. 12 U.S.C. 2603–4. RESPA's requirements apply to transactions involving a "federally related mortgage loan" as that term is defined at 12 U.S.C. 2602(1).

I. Lender Payments to Mortgage Brokers

The Conference Report on the Department's 1999 Appropriations Act directed HUD to address the issue of lender payments to mortgage brokers under RESPA. The Conference Report stated that "Congress never intended payments by lenders to mortgage brokers for goods or facilities actually furnished or for services actually performed to be violations of [Sections 8](a) or (b) (12 U.S.C. sec. 2607) in its enactment of RESPA." H. Rep. 105–769, at 260. As also directed by Congress, HUD worked with industry groups, federal agencies, consumer groups and other interested parties in collectively producing the 1999 Statement of Policy issued on March 1, 1999. 64 FR 10080. Interested members of the public are urged to consult the 1999 Statement of Policy for a more detailed discussion of the background on lender payments to brokers addressed in today's Statement.

HUD's 1999 Statement of Policy established a two-part test for determining the legality of lender payments to mortgage brokers for table funded transactions and intermediary transactions under RESPA: (1) Whether goods or facilities were actually furnished or services were actually performed for the compensation paid and; (2) whether the payments are reasonably related to the value of the goods or facilities that were actually furnished or services that were actually performed. In applying this test, HUD believes that total compensation should be scrutinized to assure that it is

reasonably related to the goods, facilities, or services furnished or performed to determine whether it is legal under RESPA. In the determination of whether payments from lenders to mortgage brokers are permissible under Section 8 of RESPA, the threshold question is whether there were goods or facilities actually furnished or services actually performed for the total compensation paid to the mortgage broker. Where a lender payment to a mortgage broker comprises a portion of total broker compensation, the amount of the payment is not, under the HUD test, scrutinized separately and apart from total broker compensation.

Since HUD issued its 1999 Statement of Policy, most courts have held that yield spread premiums from lenders to mortgage brokers are legal provided that such payments meet the test for legality articulated in the 1999 Statement of Policy and otherwise comport with RESPA. However, in a recent decision, *Culpepper* v. *Irwin Mortgage Corp.*, 253 F.3d 1324 (11th Cir. 2001), the Court of Appeals for the Eleventh Circuit upheld certification of a class in a case alleging that yield spread premiums violated Section 8 of RESPA where the defendant lender, pursuant to a prior understanding with mortgage brokers, paid yield spread premiums to the brokers based solely on the brokers' delivery of above par interest rate loans. The court concluded that a jury could find that yield spread premiums were illegal kickbacks or referral fees under RESPA where the lender's payments were based exclusively on interest rate differentials reflected on rate sheets, and the lender had no knowledge of what services, if any, the broker performed. The court described HUD's 1999 Statement of Policy as "ambiguous." *Id.* at 1327. Accordingly, and because courts have now rendered conflicting decisions, HUD has an obligation to clarify its position and issues this Statement today to provide such clarification and certainty to lenders, brokers, and consumers.

Because this clarification focuses on the legality of lender payments to mortgage brokers in transactions subject to RESPA, the coverage of this statement is restricted to payments to mortgage brokers in table funded and intermediary broker transactions. Lender payments to mortgage brokers where mortgage brokers initially fund the loan and then sell the loan after settlement are outside the coverage of this statement as exempt from RESPA under the secondary market exception.

II. Disclosure

Besides establishing the two-part test for determining the legality of yield spread premiums, the 1999 Statement of Policy discussed the importance of disclosure in permitting borrowers to choose the best loan for themselves. The mortgage transaction is complicated, and most people engage in such transactions relatively infrequently, compared to the other purchases they make. In some instances, borrowers have paid very large origination costs, either up front fees, yield spread premiums, or both, which they might have been able to avoid with timely disclosure. Timely disclosure would permit them to shop for preferable origination costs and mortgage terms and to agree to those costs and terms that meet their needs. The Department therefore is issuing a clarification of the importance of disclosure, with a description of disclosures that it considers to be best practices.

In this Statement of Policy, the Secretary is announcing that he intends to make full use of his regulatory authority as expeditiously as possible to provide clear requirements and guidance prospectively regarding disclosure of mortgage broker fees and, more broadly, to improve the mortgage settlement process so that homebuyers and homeowners are better served. Pending the promulgation of such a rule, the Secretary asks the industry to adopt new disclosure requirements to promote competition and to better serve consumers.

III. Unearned Fees

The 1999 Statement of Policy also touched upon another area of recurring questions under Section 8 of RESPA: the legality of payments that are in excess of the reasonable value of the goods or facilities provided or services performed. See 64 FR 10082-3.

Since RESPA was enacted, HUD has consistently interpreted Section 8(b) and HUD's RESPA regulations to prohibit settlement service providers from charging unearned fees, as occurred in *Echevarria* v. *Chicago Title & Trust Co.*, 256 F.3d 623 (7th Cir. 2001). Such an interpretation is consistent with Congress's finding, when enacting RESPA, that consumers need protection from unnecessarily high settlement costs. Through this Statement of Policy, HUD makes clear that Section 8(b) prohibits any person from giving or accepting any fees other than payments for goods and facilities provided or services actually performed. Payments that are unearned fees occur in, but are not limited to, cases where: (1) Two or more persons split a fee for settlement services, any portion of which is unearned; or (2) one settlement service provider marks-up the cost of the services performed or goods provided by another settlement service provider without providing additional actual, necessary, and distinct services, goods, or facilities to justify the additional charge; or (3) one settlement service provider charges the consumer a fee where no, nominal, or duplicative work is done, or the fee is in excess of the reasonable value of goods or facilities provided or the services actually performed.

In a July 5, 2001 decision, the Court of Appeals for the Seventh Circuit concluded that unearned fees must be passed from one settlement provider to another in order for such fees to violate Section 8(b). Accordingly, the court held that a settlement service provider did not violate Section 8(b) when, in billing a borrower, it added an overcharge to another

provider's fees and retained the additional charge without providing any additional goods, facilities or services. *Echevarria* v. *Chicago Title & Trust Co.* Other courts have held that two or more parties must split or share a fee in order for a violation of Section 8(b) to occur. Still other courts have stated, however, that a single provider can violate Section 8(b). Because the courts are now divided, HUD is issuing this Statement of Policy to reiterate its interpretation of Section 8(b).

The Court of Appeals for the Seventh Circuit rendered its conclusion in *Echevarria* "absent a formal commitment by HUD to an opposing position. * * *" *Id.* at 630. In issuing this Statement of Policy pursuant to Section 19(a), HUD reiterates its position on unearned fees under Section 8(b) of RESPA, which HUD regards as long standing.

IV. Statement of Policy 2001-1

To give guidance to interested members of the real estate settlement industry and the general public on the application of RESPA and its implementing regulations, the Secretary hereby issues the following Statement of Policy. The interpretations embodied in this Statement of Policy are issued pursuant to Section 19(a) of RESPA. 12 U.S.C. 2617(a).

Part A. Mortgage Broker Fees

Yield Spread Premiums

One of the primary barriers to homeownership and homeowners' ability to refinance and lower their housing costs is the up front cash needed to obtain a mortgage. The closing costs and origination fees associated with a mortgage loan are a significant component of these up front cash requirements. Borrowers may choose to pay these fees out of pocket, or to pay the origination fees, and possibly all the closing fees, by financing them; *i.e.*, adding the amount of

such fees to the principal balance of their mortgage loan. The latter approach, however, is not available to those whose loan-to-value ratio has already reached the maximum permitted by the lender. For those without the available cash, who are at the maximum loan-to-value ratio, or who simply choose to do so, there is a third option. This third option is a yield spread premium.

Yield spread premiums permit homebuyers to pay some or all of the up front settlement costs over the life of the mortgage through a higher interest rate. Because the mortgage carries a higher interest rate, the lender is able to sell it to an investor at a higher price. In turn, the lender pays the broker an amount reflective of this price difference. The payment allows the broker to recoup the up front costs incurred on the borrower's behalf in originating the loan. Payments from lenders to brokers based on the rates of borrowers' loans are characterized as "indirect" fees and are referred to as yield spread premiums.[1]

A yield spread premium is calculated based upon the difference between the interest rate at which the broker originates the loan and the par, or market, rate offered by a lender. The Department believes, and industry and consumers agree, that a yield spread premium can be a useful means to pay some or all of a borrower's settlement costs. In these cases, lender payments reduce the up front cash requirements to borrowers. In some cases, borrowers are able to obtain loans without paying any up front cash for the services required in connection with the origination of the loan. Instead, the fees for these services are financed through a higher interest rate on the loan. The yield spread premium thus can be a legitimate tool to assist the borrower. The availability of this option fosters homeownership.

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[1] Indirect fees from lenders are also known as "back funded payments," "overages," or "servicing release premiums."

HUD has recognized the utility of yield spread premiums in regulations issued prior to the 1999 Statement of Policy. In a final rule concerning "Deregulation of Mortgagor Income Requirements," HUD indicated that up front costs could be lowered by yield spread premiums.54 FR 38646 (September 20, 1989).

In a 1992 rule concerning RESPA, HUD specifically listed yield spread premiums as an example of fees that must be disclosed. The example was codified as Illustrations of Requirements of RESPA, Fact Situations 5 and 13 in Appendix B to 24 CFR part 3500. (See also Instructions at Appendix A to 24 CFR part 3500 for Completing HUD–1 and HUD–1A Settlement Statements.) HUD did not by these examples mean that yield spread premiums were *per se* legal, but HUD also did not mean that yield spread premiums were *per se* illegal.

HUD also recognizes, however, that in some cases less scrupulous brokers and lenders take advantage of the complexity of the settlement transaction and use yield spread premiums as a way to enhance the profitability of mortgage transactions without offering the borrower lower up front fees. In these cases, yield spread premiums serve to increase the borrower's interest rate and the broker's overall compensation, without lowering up front cash requirements for the borrower. As set forth in this Statement of Policy, such uses of yield spread premiums may result in total compensation in excess of what is reasonably related to the total value of the origination services provided by the broker, and fail to comply with the second part of HUD's two-part test as enunciated in the 1999 Statement of Policy, and with Section 8.

The 1999 Statement of Policy's Test for Legality

The Department restates its position that yield spread premiums are not per se illegal. HUD also reiterates that this statement "does not imply * * * that yield spread premiums

are legal in individual cases or classes of transactions." 64 FR 10084. The legality of any yield spread premium can only be evaluated in the context of the test HUD established and the specific factual circumstances applicable to each transaction in which a yield spread premium is used.

The 1999 Statement of Policy established a two-part test for determining whether lender payments to mortgage brokers are legal under RESPA. In applying Section 8 and HUD's regulations, the 1999 Statement of Policy stated:

> In transactions where lenders make payments to mortgage brokers, HUD does not consider such payments (*i.e.*, yield spread premiums or any other class of named payments) to be illegal *per se*. HUD does not view the name of the payment as the appropriate issue under RESPA. HUD's position that lender payments to mortgage brokers are not illegal *per se* does not imply, however, that yield spread premiums are legal in individual cases or classes of transactions. The fees in cases and classes of transactions are illegal if they violate the prohibitions of Section 8 of RESPA.
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> In determining whether a payment from a lender to a mortgage broker is permissible under Section 8 of RESPA, the first question is whether goods or facilities were actually furnished or services were actually performed for the compensation paid. The fact that goods or facilities have been actually furnished or that services have been actually performed by the mortgage broker does not by itself make the payment legal. The second question is whether the payments are reasonably related to the value of the goods or facilities that were actually furnished or services that were actually performed.
>
> In applying this test, HUD believes that total compensation should be scrutinized to assure that it is reasonably related to goods, facilities, or services furnished or performed to determine whether it is legal

under RESPA. Total compensation to a broker includes direct origination and other fees paid by the borrower, indirect fees, including those that are derived from the interest rate paid by the borrower, or a combination of some or all. The Department considers that higher interest rates alone cannot justify higher total fees to mortgage brokers. All fees will be scrutinized as part of total compensation to determine that total compensation is reasonably related to the goods or facilities actually furnished or services actually performed. HUD believes that total compensation should be carefully considered in relation to price structures and practices in similar transactions and in similar markets. 64 FR 10084.

Culpepper

The need for further clarification of HUD's position, as set forth in the 1999 Statement of Policy, on the treatment of lender payments to mortgage brokers under Section 8 of RESPA (12 U.S.C. 2607), is evident from the recent decision of the Court of Appeals for the Eleventh Circuit in *Culpepper.*

In upholding class certification in *Culpepper,* the court only applied the first part of the HUD test, and then further narrowed its examination of whether the lender's yield spread payments were "for services" by focusing exclusively on the presumed intent of the lender in making the payments. The crux of the court's decision is that Section 8 liability for the payment of unlawful referral fees could be established under the first part of the HUD test alone, based on the facts that the lender's payments to mortgage brokers were calculated solely on the difference between the par interest rate and the higher rate at which the mortgage brokers delivered loans, and that the lender had no knowledge of what services, if any, the brokers had performed.

HUD was not a party to the case and disagrees with the judicial interpretation regarding Section 8 of RESPA and the 1999 Statement of Policy.

Clarification of the HUD Test

It is HUD's position that where compensable services are performed, the 1999 Statement of Policy requires application of both parts of the HUD test before a determination can be made regarding the legality of a lender payment to a mortgage broker.

1. *The First Part of the HUD Test:* Under the first part of HUD's test, the total compensation to a mortgage broker, of which a yield spread premium may be a component or the entire amount, must be for goods or facilities provided or services performed. HUD's position is that in order to discern whether a yield spread premium was for goods, facilities or services under the first part of the HUD test, it is necessary to look at each transaction individually, including examining all of the goods or facilities provided or services performed by the broker in the transaction, whether the goods, facilities or services are paid for by the borrower, the lender, or partly by both.

It is HUD's position that neither Section 8(a) of RESPA nor the 1999 Statement of Policy supports the conclusion that a yield spread premium can be presumed to be a referral fee based solely upon the fact that the lender pays the broker a yield spread premium that is based upon a rate sheet, or because the lender does not have specific knowledge of what services the broker has performed. HUD considers the latter situation to be rare. The common industry practice is that lenders follow underwriting standards that demand a review of originations and that therefore lenders typically know that brokers have performed the services required to meet those standards.

Yield spread premiums are by definition derived from the interest rate. HUD believes that a rate sheet is merely a mechanism for displaying the yield spread premium, and does not indicate whether a particular yield spread premium is a payment for goods and facilities actually furnished or services actually performed under the HUD test. Whether or not a yield spread premium is legal or illegal cannot be determined by the use of a rate sheet, but by how HUD's test applies to the transaction involved.

Section 8 prohibits the giving and accepting of fees, kickbacks, or things of value for the referral of settlement services and also unearned fees. It is therefore prudent for a lender to take action so as to ensure that brokers are performing compensable services and receiving only compensation that, in total, is reasonable for those services provided. As stated, however, in the 1999 Statement of Policy:

> The Department recognizes that some of the goods or facilities actually furnished or services actually performed by the broker in originating a loan are "for" the lender and other goods or facilities actually furnished or services actually performed are "for" the borrower. HUD does not believe that it is necessary or even feasible to identify or allocate which facilities, goods or services are performed or provided for the lender, for the borrower, or as a function of State or Federal law. All services, goods and facilities inure to the benefit of both the borrower and the lender in the sense that they make the loan transaction possible. * * * 64 FR 10086.

The 1999 Statement of Policy provided a list of compensable loan origination services originally developed by HUD in a response to an inquiry from the Independent Bankers Association of America (IBAA), which HUD considers relevant in evaluating mortgage broker services. In analyzing each transaction to determine if services are performed HUD believes the 1999 Statement of Policy should

be used as a guide. As stated there, the IBAA list is not exhaustive, and while technology is changing the process of performing settlement services, HUD believes that the list is still a generally accurate description of settlement services. Compensation for these services may be paid either by the borrower or by the lender, or partly by both. Compensable services for the first part of the test do not include referrals or no, nominal, or duplicative work.

2. *Reasonableness of Broker Fees:* The second part of HUD's test requires that total compensation to the mortgage broker be reasonably related to the total set of goods or facilities actually furnished or services performed.

The 1999 Statement of Policy said in part:

> The Department considers that higher interest rates alone cannot justify higher total fees to mortgage brokers. All fees will be scrutinized as part of total compensation to determine that total compensation is reasonably related to the goods or facilities actually furnished or services actually performed. 64 FR 10084.

Accordingly, the Department believes that the second part of the test is applied by determining whether a mortgage broker's total compensation is reasonable. Total compensation includes fees paid by a borrower and any yield spread premium paid by a lender, not simply the yield spread premium alone. Yield spread premiums serve to allow the borrower a lower up front cash payment in return for a higher interest rate, while allowing the broker to recoup the total costs of originating the loan. Total compensation to the broker must be reasonably related to the total value of goods or facilities provided or services performed by the broker. Simply delivering a loan with a higher interest rate is not a compensable service. The Department affirms the 1999 Statement of Policy's position on this matter for purposes of RESPA enforcement.

The 1999 Statement also said:

> In analyzing whether a particular payment or fee bears a reasonable relationship to the value of the goods or facilities actually furnished or services actually performed, HUD believes that payments must be commensurate with the amount normally charged for similar services, goods or facilities. This analysis requires careful consideration of fees paid in relation to price structures and practices in similar transactions and in similar markets. If the payment or a portion thereof bears no reasonable relationship to the market value of the goods, facilities or services provided, the excess over the market rate may be used as evidence of a compensated referral or an unearned fee in violation of Section 8(a) or (b) of RESPA. 64 FR 10086.

The 1999 Statement of Policy also stated:

> The level of services mortgage brokers provide in particular transactions depends on the level of difficulty involved in qualifying applicants for particular loan programs. For example, applicants have differences in credit ratings, employment status, levels of debt, or experience that will translate into various degrees of effort required for processing a loan. Also, the mortgage broker may be required to perform various levels of services under different servicing or processing arrangements with wholesale lenders. 64 FR 10081.

In evaluating mortgage broker fees for enforcement purposes, HUD will consider these factors as relevant in assessing the reasonableness of mortgage broker compensation, as well as comparing total compensation for loans of similar size and similar characteristics within similar geographic markets.

Also, while the Department continues to believe that comparison to prices in similar markets is generally a key factor

in determining whether a mortgage broker's total compensation is reasonable, it is also true that in less competitive markets comparisons to the prices charged by other similarly situated providers may not, standing alone, provide a useful measure. As a general principle, HUD believes that in evaluating the reasonableness of broker compensation in less competitive markets, consideration of price structures from a wider range of providers may be warranted to reach a meaningful conclusion.

Part B. Providing Meaningful Information to Borrowers

In addition to addressing the legality of yield spread premiums in the 1999 Statement of Policy, HUD emphasized the importance of disclosing broker fees, including yield spread premiums

> There is no requirement under existing law that consumers be fully informed of the broker's services and compensation prior to the GFE. Nevertheless, HUD believes that the broker should provide the consumer with information about the broker's services and compensation, and agreement by the consumer to the arrangement should occur as early as possible in the process. 64 FR 10087.

HUD continues to believe that disclosure is extremely important, and that many of the concerns expressed by borrowers over yield spread premiums can be addressed by disclosing yield spread premiums, borrower compensation to the broker, and the terms of the mortgage loan, so that the borrower may evaluate and choose among alternative loan options.

In the 1999 Statement of Policy, HUD stated:

> * * * HUD believes that for the market to work effectively, borrowers should be afforded a meaningful opportunity to select the most appropriate product and

determine what price they are willing to pay for the loan based on disclosures which provide clear and understandable information.

The Department reiterates its long-standing view that disclosure alone does not make illegal fees legal under RESPA. On the other hand, while under current law, preapplication disclosure to the consumer is not required, HUD believes that fuller information provided at the earliest possible moment in the shopping process would increase consumer satisfaction and reduce the possibility of misunderstanding. 64 FR 10087.

HUD currently requires the disclosure of yield spread premiums on the Good Faith Estimate and the HUD–1. The 1999 Statement of Policy said:

The Department has always indicated that any fees charged in settlement transactions should be clearly disclosed so that the consumer can understand the nature and recipient of the payment. Code-like abbreviations like 'YSP to DBG, POC', for instance, have been noted. [Footnote omitted.] Also the Department has seen examples on the GFE and/or the settlement statement where the identity and/or purposes of the fees are not clearly disclosed.

The Department considers unclear and confusing disclosures to be contrary to the statute's and the regulation's purposes of making RESPA-covered transactions understandable to the consumer. At a minimum, all fees to the mortgage broker are to be clearly labeled and properly estimated on the GFE. On the settlement statement, the name of the recipient of the fee (in this case, the mortgage broker) is to be clearly labeled and listed, and the fee received from a lender is to be clearly labeled and listed in the interest of clarity. 64 FR 10086-10087.

While the disclosure on the GFE and HUD-1 is required, the Department is aware and has stated that the current GFE/HUD-1 disclosure framework is often insufficient to adequately inform consumers about yield spread premiums and other lender paid fees to brokers. Under the current rules, the GFE need not be provided until after the consumer has applied for a mortgage and may have paid a significant fee, and the HUD-1 is only given at closing. Because of this, HUD has in recent years sought to foster a more consumer beneficial approach to disclosure regarding yield spread premiums through successive rulemaking efforts. This history is discussed more fully in the 1999 Statement of Policy.[2]

Representatives of the mortgage industry have said that since the 1999 Statement of Policy, many brokers provide borrowers a disclosure describing the function of mortgage brokers and stating that a mortgage broker may receive a fee in the transaction from the lender. While the 1999 Statement of Policy commended the National Association of Mortgage Brokers and the Mortgage Bankers Association of America for strongly suggesting such a disclosure to their respective memberships, the Statement of Policy added:

> Although this statement of policy does not mandate disclosures beyond those currently required by RESPA and Regulation X, the most effective approach to disclosure would allow a prospective borrower to properly evaluate the nature of the services and all costs for a broker transaction, and to agree to such services and costs before applying for a loan. Under such an approach, the broker would make the borrower aware of whether the broker is or is not serving as the consumer's

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[2] In both the HUD/Federal Reserve Board Report on RESPA/TILA Reform, 1998, and the HUD/ Treasury Report on Curbing Predatory Home Mortgage Lending, 2000, the agencies recommended earlier disclosures to facilitate shopping and lower settlement costs.

agent to shop for a loan, and the total compensation to be paid to the mortgage broker, including the amounts of each of the fees making up the compensation. 64 FR 10087.

In HUD's view, meaningful disclosure includes many types of information: what services a mortgage broker will perform, the amount of the broker's total compensation for performing those services (including any yield spread premium paid by the lender), and whether or not the broker has an agency or fiduciary relationship with the borrower. The disclosure should also make the borrower aware that he or she may pay higher up front costs for a mortgage with a lower interest rate, or conversely pay a higher interest rate in return for lower up front costs, and should identify the specific trade-off between the amount of the increase in the borrower's monthly payment (and also the increase in the interest rate) and the amount by which up front costs are reduced. HUD believes that disclosure of this information, and written acknowledgment by the borrower that he or she has received the information, should be provided early in the transaction. Such disclosure facilitates comparison shopping by the borrower, to choose the best combination of up front costs and mortgage terms from his or her individual standpoint. HUD regards full disclosure and written acknowledgment by the borrower, at the earliest possible time, as a best practice.

Yield spread premiums are currently required to be listed in the "800" series of the HUD–1 form, listing "Items Payable in Connection with Loan." This existing practice, however, does not disclose the purpose of the yield spread premium, which is to lower up front cost to borrowers. To achieve this end it has been suggested to the Department that the yield spread premium should be reported as a credit to the borrower in the "200" series, among the "Amounts Paid by or in Behalf of Borrowers." The homebuyer or homeowner

could then see that the yield spread premium is reducing closing costs, and also see the extent of the reduction.

HUD believes that improved early disclosure regarding mortgage broker compensation and the entry of yield spread premiums as credits to borrowers on the GFE and the HUD–1 settlement statement are both useful and complementary forms of disclosure. The Department believes that used together these methods of disclosure offer greater assurance that lender payments to mortgage brokers serve borrowers' best interests.

While the 1999 Policy Statement and IV. Part A. of this Statement only cover certain lender payments to mortgage brokers, as described above, HUD also believes that similar information on the trade-off between lower up front costs and higher interest rates and monthly payments should be disclosed to borrowers on all mortgage loan originations, not merely those originated by brokers. HUD is aware that while yield spread premiums are not used in loans originated by lenders, lenders are able to offer loans with low or no up front costs required at closing by charging higher interest rates and recouping the costs by selling the loans into the secondary market for a price representing the difference between the interest rate on the loan and the par, or market, interest rate. Sale of such a loan achieves the same purpose as the yield spread premium does on a loan originated by a broker. The Department strongly believes that all lenders and brokers should provide the level of consumer disclosure that the purposes of RESPA intend and that fair business practices demand. As indicated in the 1999 Statement of Policy, HUD emphasizes that fuller information provided as early as possible in the shopping process would increase consumer satisfaction and reduce the possibility of misunderstanding. In the future, full and early disclosures are factors that the Department would weigh favorably in exercising its enforcement discretion in cases involving mortgage broker

fees. Nevertheless, the Department also again makes clear that disclosure alone does not make illegal fees legal under RESPA. The Department will scrutinize all relevant information in making enforcement decisions, including whether transactions evidence practices that may be illegal.

Part C. Section 8(b) Unearned Fees

A. Background

RESPA was enacted in 1974 to provide consumers "greater and more timely information on the nature of the costs of the [real estate] settlement process" and to protect consumers from "unnecessarily high settlement charges caused by certain abusive practices * * *" 12 U.S.C. 2601.

Since RESPA was enacted, HUD has interpreted Section 8(b) as prohibiting any person from giving or accepting any unearned fees, i.e., charges or payments for real estate settlement services other than for goods or facilities provided or services performed. Payments that are unearned fees for settlement services occur in, but are not limited to, cases where: (1) Two or more persons split a fee for settlement services, any portion of which is unearned; or (2) one settlement service provider marks-up the cost of the services performed or goods provided by another settlement service provider without providing additional actual, necessary, and distinct services, goods, or facilities to justify the additional charge; or (3) one settlement service provider charges the consumer a fee where no, nominal, or duplicative work is done, or the fee is in excess of the reasonable value of goods or facilities provided or the services actually performed.

In the first situation, two settlement service providers split or share a fee charged to a consumer and at least part, if not all, of at least one provider's share of the fee is unearned. In the second situation, a settlement service provider charges a fee to a consumer for another provider's services that is

higher than the actual price of such services, and keeps the difference without performing any actual, necessary, and distinct services to justify the additional charge. In the third situation, one settlement service provider charges a fee to a consumer where no work is done or the fee exceeds the reasonable value of the services performed by that provider, and for this reason the fee or any portion thereof for which services are not performed is unearned.

HUD regards all of these situations as legally indistinguishable, in that they involve payments for settlement services where all or a portion of the fees are unearned and, thus, are violative of the statute. HUD, therefore, specifically interprets Section 8(b) as not being limited to situations where at least two persons split or share an unearned fee for the provision to be violated.

As already indicated in this Statement of Policy, meaningful disclosure of all charges and fees is essential under RESPA. Such disclosures help protect consumers from paying unearned or duplicate fees. However, as noted above, in the 1999 Statement of Policy the Department reiterated "its long-standing view that disclosure alone does not make illegal fees legal under RESPA." 64 FR 10087.

B. HUD's Guidance and Regulations

HUD guidance and regulations have consistently interpreted Section 8 as prohibiting all unearned fees. In 1976, HUD issued a Settlement Costs Booklet that provided that "[i] t is also illegal to charge or accept a fee or part of a fee where no service has actually been performed." 41 FR 20289 (May 17, 1976). Between 1976 and 1992, HUD indicated in informal opinions that unearned fees occur where there are

excessive fees charged, regardless of the number of settlement service providers involved.[3]

In the preamble to HUD's 1992 final rule revising Regulation X (57 FR 49600 (November 2, 1992)), HUD stated: "Section 8 of RESPA (12 U.S.C. 2607) prohibits kickbacks for referral of business incident to or part of a settlement service and also prohibits the splitting of a charge for a settlement service, other than for services actually performed (*i.e.*, no payment of unearned fees)." 57 FR 49600 (November 2, 1992).

HUD's regulations, published on November 2, 1992, implement Section 8(b). Section 3500.14(c)[4] provides:

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or

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[3] *See e.g.*, Old Informal Opinion (6), August 16, 1976 and Old Informal Opinion (65), April 4, 1980; Barron and Berenson, *Federal Regulation of Real Estate and Mortgage Lending*, (4th Ed.1998). On November 2, 1992 (57 F.R. 49600), when HUD issued revisions to its RESPA regulations, it withdrew all of its informal counsel opinions and staff interpretations issued before that date. The 1992 rule provided, however, that courts and administrative agencies could use HUD's previous opinions to determine the validity of conduct occurring under the previous version of Regulation X. *See* 24 CFR 3500.4(c).

[4] The heading to 24 CFR 3500.14 is titled "Prohibition against kickbacks and unearned fees." However, the heading of subsection (c) is titled "split of charges," and the preamble to the November 1992 rule states "[s]ection 8 of RESPA (12 U.S.C. 2607) prohibits kickbacks for referral of business incident to or part of a settlement service and also prohibits the splitting of a charge for a settlement service, other than for services actually performed (i.e., no payment of unearned fees)." 57 FR 49600 (November 2, 1992). The rule headings and preamble text are a generalized description of Section 8 that is more developed in the actual regulation text. As discussed in Section D of this Statement of Policy, HUD believes that the actual text of the rules, as amended in 1992, makes clear that Section 8(b)'s prohibitions against unearned fees apply even when only one settlement service provider is involved.

> received for the rendering of a settlement service in connection with a transaction involving a federally-related mortgage loan other than for services actually performed. A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this Section. The source of the payment does not determine whether or not a service is compensable. Nor may the prohibitions of this part be avoided by creating an arrangement wherein the purchaser of services splits the fee.

24 CFR 3500.14(g)(2) states in part:

> The Department may investigate high prices to see if they are the result of a referral fee or a split of a fee. If the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods actually performed or provided. These facts may be used as evidence of a violation of Section 8 and may serve as a basis for a RESPA investigation. High prices standing alone are not proof of a RESPA violation.

24 CFR 3500.14(g)(3) provides in part:

> When a person in a position to refer settlement service business * * * receives a payment for providing additional settlement services as part of a real estate transaction, such payment must be for services that are actual, necessary and distinct from the primary services provided by such person.

In Appendix B to the HUD RESPA regulations, HUD provides illustrations of the requirements of RESPA. Comment 3 states in part:

> The payment of a commission or portion of the * * * premium * * * or receipt of a portion of the payment * * * where no substantial services are being

> performed * * * is a violation of Section 8 of RESPA. It makes no difference whether the payment comes from [the settlement service provider] or the purchaser. The amount of the payment must bear a reasonable relationship to the services rendered. Here [the real estate broker in the example] is being compensated for a referral of business to [the title company].

In 1996, in the preamble to the final rule on the Withdrawal of Employer/ Employee and Computer Loan Origination Systems Exemptions[5] (61 FR 29238 (June 7, 1996)), HUD reiterated its interpretation of Section 8(b) of RESPA as follows:

> HUD believes that Section 8(b) of the statute and the legislative history make clear that no person is allowed to receive 'any portion' of charges for settlement services, except for services actually performed. The provisions of Section 8(b) could apply in a number of situations: (1) where one settlement service provider receives an unearned fee from another provider; (2) where one settlement service provider charges the consumer for third-party services and retains an unearned fee from the payment received; or (3) where one settlement service provider accepts a portion of a charge (including 100% of the charge) for other than services actually performed. The interpretation urged [by the commenters to the proposed rule published on July 21, 1994], that a single settlement service provider can charge unearned or excessive fees so long as the fees are not shared with another, is an unnecessarily restrictive interpretation of a statute designed to reduce unnec-

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[5] This final rule was delayed by legislation, but the Department implemented portions of the final rule that were not affected by the legislative delay on November 15, 1996. 61 FR 58472 (November 15, 1996).

> essary costs to consumers. The Secretary, charged by statute with interpreting RESPA, interprets Section 8(b) to mean that two persons are not required for the provision to be violated. 61 FR 29249.

The latest revision to the Settlement Costs Booklet for consumers, issued in 1997, also provides "[i]t is also illegal for anyone to accept a fee or part of a fee for services if that person has not actually performed settlement services for the fee." 62 FR 31998 (June 11, 1997).

Further, HUD has provided information to the public and the mortgage industry in the "Frequently Asked Questions" section of its RESPA Web site, located at <*http://www.hud.gov/fha/sfh/res/resindus.html*>. Question 25 states:

> Can a lender collect from the borrower an appraisal fee of $200, listing the fee as such on the HUD-1, yet pay an independent appraiser $175 and collect the $25 difference?

The answer reads:

> No, the lender may only collect $175 as the actual charge. It is a violation of Section 8(b) for any person to accept a split of a fee where services are not performed.

In 1999, by letter submitted at the request of the Superior Court of California, Los Angeles County, in the case of *Brown* v. *Washington Mutual Bank* (Case No. BC192874), HUD provided the following response to a specific question posed by the court on lender "markups" of another settlement service provider's fees:

> A lender that purchases third party vendor services for purposes of closing a federally related mortgage loan may not, under RESPA, mark up the third party vendor fees for purposes of making a profit. HUD has consistently advised that where lenders or others charge consumers marked-up prices for services performed by

> the third party providers without performing additional services, such charges constitute "splits of fees" or "unearned fees" in violation of Section 8(b) of RESPA.

HUD noted in its letter to the court that the response reflected the Department's long-standing position.

C. Recent Cases

Notwithstanding HUD's regulations and other guidance, the Court of Appeals for the Seventh Circuit held, in *Echevarria* v. *Chicago Title and Trust Co.*, 256 F.3d 623 (7th Cir. 2001), that Section 8(b) was not violated where a title company, without performing any additional services, charged the plaintiffs more money than was required by the recorder's office to record a deed and the title company then retained the difference. The court reasoned that plaintiffs "failed to plead facts tending to show that Chicago Title illegally shared fees with the Cook County Recorder. The Cook County Recorder received no more than its regular recording fees and it did not give to or arrange for Chicago Title to receive an unearned portion of these fees. The County Recorder has not engaged in the third party involvement necessary to state a claim under [RESPA § 8(b)]." Id. at 626. The court in essence concluded that unearned fees must be passed from one settlement provider to another in order for such fees to violate Section 8(b).

Earlier, in *Willis* v. *Quality Mortgage USA, Inc.*, 5 F. Supp. 2d 1306 (M.D. Ala. 1998), cited by the Seventh Circuit in support of its conclusion, the district court concluded that 24 CFR 3500.14(c), "[w]hen read as a whole," prohibits payments for which no services are performed "only if those payments are split with another party." Id. at 1309. The *Willis* court held that there must be a split of a charge between a settlement service provider and a third party to establish a violation Section 8(b). The court also concluded that 24 CFR 3500.14(g)(3) only applied when there was a payment from a

lender to a broker, or vice versa. The payment from a borrower to a mortgage lender could not be the basis for a violation of 24 CFR 3500.14(g)(3) and Section 8(b).

HUD was not a party to the cases and disagrees with these judicial interpretations of Section 8(b) which it regards as inconsistent with HUD's regulations and HUD's long-standing interpretations of Section 8(b).

D. Unearned Fees Under Section 8(b)

This Statement of Policy reaffirms HUD's existing, long-standing interpretation of Section 8(b) of RESPA. Sections 8(a) and (b) of RESPA contain distinct prohibitions. Section 8(a) prohibits the giving or acceptance of any payment pursuant to an agreement or understanding for the referral of settlement service business involving a federally related mortgage loan; it is intended to eliminate kickbacks or compensated referral arrangements among settlement service providers. Section 8(b) prohibits the giving or accepting of any portion, split, or percentage of any charge other than for goods or facilities provided or services performed; it is intended to eliminate unearned fees. Such fees are contrary to the Congressional finding when enacting RESPA that consumers need protection from unnecessarily high settlement charges. 12 U.S.C. 2601(a).

It is HUD's position that Section 8(b) proscribes the acceptance of any portion or part of a charge other than for services actually performed. Inasmuch as Section 8(b)'s proscription against "any portion, split, or percentage" of an unearned charge for settlement services is written in the disjunctive, the prohibition is not limited to a split. In HUD's view, Section 8(b) forbids the paying or accepting of any portion or percentage of a settlement service— including up to 100%— that is unearned, whether the entire charge is divided or split among more than one person or entity or is retained by a single person. Simply put, given that Section 8(b) proscribes

unearned portions or percentages as well as splits, HUD does not regard the provision as restricting only fee splitting among settlement service providers. Further, since Section 8(b) on its face prohibits the giving or accepting of an unearned fee by any person, and 24 CFR 3500.14(c) speaks of a charge by "a person," it is also incorrect to conclude that the Section 8(b) proscription covers only payments or charges among settlement service providers.[6]

A settlement service provider may not levy an additional charge upon a borrower for another settlement service provider's services without providing additional services that are bona fide and justify the increased charge. Accordingly, a settlement service provider may not mark-up the cost of another provider's services without providing additional settlement services; such payment must be for services that are actual, necessary and distinct services provided to justify the charge. 24 CFR 3500.14(g)(3).[7] The HUD regulation implementing Section 8(b) states: "[a] charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this Section." 24 CFR 3500.14 (c).

The regulations also make clear that a charge by a single service provider where little or no services are performed is an unearned fee that is prohibited by the statute. 24 CFR 3000.14(c). A single service provider is also prohibited from charging a duplicative fee. Further, a single service provider cannot serve in two capacities, e.g., a title agent and closing attorney, and be paid twice for the same service. The fee the

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[6] HUD is, of course, unlikely to direct any enforcement actions against consumers for the payment of unearned fees, because a consumer's intent is to make payment for services, not an unearned fee.

[7] HUD notes that some lenders have charged an additional fee merely for "reviewing" another settlement service provider's services. HUD does not regard such "review" as constituting an actual, necessary, or distinct additional service permissible under HUD's regulations.

service provider would be receiving in this case is duplicative under 24 CFR 3000.14(c) and not necessary and distinct under 24 CFR 3000.14(g)(3). Clearly, in all of these instances, the source of the payment—whether from consumers, other settlement service providers, or other third parties—is not relevant in determining whether the fee is earned or unearned because ultimately, all settlement payments come directly or indirectly from the consumer. See 24 CFR 3500.14(c). Therefore, a single settlement service provider violates Section 8(b) whenever it receives an unearned fee.

A single service provider also may be liable under Section 8(b) when it charges a fee that exceeds the reasonable value of goods, facilities, or services provided. HUD's regulations as noted state: "If the payment of a thing of value bears no relationship to the goods or services provided, then the excess is not for services or goods actually performed or provided." 24 CFR 3500.14(g)(2). Section 8(c)(2) only allows "the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or services actually performed," i.e., permitting only that compensation which is reasonably related to the goods or facilities provided or services performed. Compensation that is unreasonable is unearned under Section 8(b) and is not bona fide under Section 8(c)(2).

The Secretary, therefore, interprets Section 8(b) of RESPA to prohibit all unearned fees, including, but not limited to, cases where: (1) Two or more persons split a fee for settlement services, any portion of which is unearned; or (2) one settlement service provider marks-up the cost of the services performed or goods provided by another settlement service provider without providing additional actual, necessary, and distinct services, goods, or facilities to justify the additional charge; or (3) one service provider charges the consumer a fee where no, nominal, or duplicative work is

done, or the fee is in excess of the reasonable value of goods or facilities provided or the services actually performed.

V. Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) has reviewed this Statement of Policy in accordance with Executive Order 12866, (captioned "Regulatory Planning and Review"). OMB determined that this Statement of Policy is a "significant regulatory action" as defined in Section 3(f) of the Order (although not an economically significant regulatory action under the Order). Any changes to the Statement of Policy resulting from this review are available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk.

Dated: October 15, 2001.

John C. Weicher,

Assistant Secretary for Housing-Federal Housing Commissioner.

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